CUSTOMS BULLETIN AND DECISIONS

Weekly Compilation of

Decisions, Rulings, Regulations, and Notices

Concerning Customs and Related Matters of the

U.S. Customs Service

U.S. Court of Appeals for the Federal Circuit

and

U.S. Court of International Trade

VOL. 28 **APRIL 13, 1994** **NO. 15**

This issue contains:

U.S. Customs Service
- T.D. 94–27 Through 94–33
- T.D. 94–1 (Errata)
- T.D. 94–5 (Suspension)
- General Notices
- Proposed Rulemakings

U.S. Court of International Trade
- Slip Op. 94–50
- Abstracted Decisions:
  - Classification: C94/20 Through C94/23
  - Valuation: V94/8 and V94/9

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE

NOTICE

The decisions, rulings, notices and abstracts which are published in the CUSTOMS BULLETIN are subject to correction for typographical or other printing errors. Users may notify the U.S. Customs Service, Office of Logistics Management, Printing and Distribution Branch, Washington, D.C. 20229, of any such errors in order that corrections may be made before the bound volumes are published.

For sale by the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402

U.S. Customs Service

Treasury Decisions

(T.D. 94–27)

EXTENSION OF SGS CONTROL SERVICES, INC.'S CUSTOMS GAUGER APPROVAL TO THE SITE LOCATED IN BAYTOWN, TEXAS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of the extension of SGS Control Services, Inc.'s Customs gauger approval to include their Baytown, Texas gauging facility.

SUMMARY: SGS Control Services, Inc., a Customs approved gauger and accredited laboratory under Section 151.13 of the Customs Regulations (19 CFR 151.13), has been given an extension of its Customs gauger approval to include the Baytown, Texas site. Specifically, the extension given to the Baytown site will include the approval to gauge petroleum and petroleum products, organic compounds in bulk and liquid form and animal and vegetable oils.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Part 151 of the Customs Regulations provides for the acceptance at Customs Districts of laboratory analyses and gauging reports for certain products from Customs accredited commercial laboratories and approved gaugers. SGS Control Services, Inc., a Customs commercial approved gauger and accredited laboratory, has applied to Customs to extend its Customs gauger approval to its Baytown, Texas facility. Review of the qualifications of the Baytown site shows that the extension is warranted and, accordingly, has been granted.

EFFECTIVE DATE: March 22, 1994.

FOR FURTHER INFORMATION CONTACT: Ira S. Reese, Chief, Technical Branch, Office of Laboratories and Scientific Services, U.S. Customs Service, 1301 Constitution Ave., NW, Washington, D.C. 20229 at (202) 927–1060.

Dated: March 24, 1994.

GEORGE D. HEAVEY,
Director,
Office of Laboratories and Scientific Services.

[Published in the Federal Register, March 30, 1994 (59 FR 14952)]

(T.D. 94–28)

EXTENSION OF CHEM COAST, INC.'S CUSTOMS GAUGER APPROVAL TO THE SITE LOCATED IN CORPUS CHRISTI, TEXAS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of the extension of Chem Coast, Inc.'s Customs gauger approval to include their Corpus Christi, Texas gauging facility.

SUMMARY: Chem Coast, Inc., of Laporte, Texas, a Customs approved gauger and accredited laboratory under Section 151.13 of the Customs Regulations (19 CFR 151.13), has been given an extension of its Customs gauger approval to include the Corpus Christi, Texas site. Specifically, the extension given to the Corpus Christi site will include the approval to gauge petroleum and petroleum products, organic compounds in bulk and liquid form and animal and vegetable oils.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Part 151 of the Customs Regulations provides for the acceptance at Customs Districts of laboratory analyses and gauging reports for certain products from Customs accredited commercial laboratories and approved gaugers. Chem Coast, Inc., a Customs commercial approved gauger and accredited laboratory, has applied to Customs to extend its Customs gauger approval to its Corpus Christi, Texas facility. Review of the qualifications of the Corpus Christi site shows that the extension is warranted and, accordingly, has been granted.

APPROVED-ACCREDITED SITES

Chem Coast, Inc., has been approved and/or accredited by the U.S. Customs Services at the following locations: Corpus Christi, Texas; Laporte, Texas; and Nederland, Texas.

EFFECTIVE DATE: March 22, 1994.

FOR FURTHER INFORMATION CONTACT: Ira S. Reese, Chief, Technical Branch, Office of Laboratories and Scientific Services, U.S. Customs Service, 1301 Constitution Ave., NW, Washington, D.C. 20229 at (202) 927–1060.

Dated: March 24, 1994.

GEORGE D. HEAVEY,
Director,
Office of Laboratories and Scientific Services.

[Published in the Federal Register, March 30, 1994 (59 FR 14951)]

19 CFR Part 171

(T.D. 94–29)

PENALTY GUIDELINES APPLICABLE TO TRANSSHIPPED TEXTILES AND TEXTILE PRODUCTS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Interim rule; solicitation of comments.

SUMMARY: This document amends the revised penalty guidelines pertaining to section 592 of the Tariff Act of 1930, as amended, to add, as an example of an aggravating factor in arriving at a final administrative penalty decision, violations involving the illegal importation and entry of transshipped textiles and textile products. This amendment will enhance the U.S. textile import program and other programs or laws administered or enforced by Customs which involve a determination of the country of origin of imported merchandise.

DATES: Interim rule effective on, and applicable to all textiles and textile products entered, or withdrawn from warehouse for consumption, on or after, April 1, 1994. Comments must be received on or before May 31, 1994.

ADDRESSES: Written comments (preferably in triplicate) may be addressed to the Regulations Branch, U.S. Customs Service, Franklin Court, 1301 Constitution Avenue, N.W., Washington, D.C. 20229. Comments submitted may be inspected at the Regulations Branch, Office of Regulations and Rulings, Franklin Court, 1099 14th Street, N.W., Suite 4000, Washington, D.C.

FOR FURTHER INFORMATION CONTACT: Robert Pisani, Penalties Branch, Office of Regulations and Rulings (202–482–6950).

SUPPLEMENTARY INFORMATION:

BACKGROUND

Customs is confronted with a continuing problem involving textiles and textile products which, after exportation from their country of origin, are transshipped through a second country, thereby facilitating a false or otherwise unlawful statement, act, or omission regarding the country of origin of the merchandise when ultimately imported and entered in the United States. Such statements, acts or omissions may impinge on a number of programs or laws administered or enforced by Customs, including country of origin marking requirements, textile quota limitations and visa requirements under the U.S. textile import program, duty assessment and collection, and collection of trade statistics. The consequences of such unlawful statements, acts or omissions may include interference with the consumer's right to make an

informed decision regarding a prospective purchase, undermining of bilateral and multilateral textile agreements to which the United States is a party and with resulting injury to domestic producers of textiles and textile products, loss of revenue, and inability to maintain proper trade statistics to support overall U.S. trade policy and analysis.

Under section 592 of the Tariff Act of 1930, as amended (19 U.S.C. 1592), a penalty may be assessed against any party who has committed fraud, gross negligence or negligence in connection with the unlawful entry of any merchandise in the United States, including textiles and textile products that have been transshipped in the circumstances described above. Provisions relating to filing of petitions, and action upon petitions, for relief from fines, penalties and forfeitures incurred under laws administered by Customs, including penalties under section 592, are set forth in Part 171 of the Customs Regulations (19 CFR Part 171). Appendix B to Part 171 sets forth Revised Penalty Guidelines under section 592. Although Appendix B is not intended to have regulatory effect, it represents the official Customs position regarding the standards that are generally applicable to the administrative review of petitions for remission or mitigation of penalties incurred under section 592. Appendix B includes, in section (G), certain factors that may be determined by Customs to be aggravating factors in arriving at a final administrative penalty decision. Appendix B is currently undergoing review within Customs with a view to publication of a proposed revision of those guidelines, with opportunity for public comment, in the near future.

Notwithstanding the upcoming revision of Appendix B to Part 171 and the intended solicitation of public comments thereon, Customs has determined that immediate action must be taken in a penalty mitigation context to address the textile and textile products transshipment problem described above. Customs notes that transshipments have resulted in material false statements, acts or omissions regarding the country of origin of the imported merchandise, including false designations of origin. Consequently, it is Customs position that transshipment must be susceptible to treatment as an aggravating factor in arriving at a final mitigated section 592 penalty decision under Part 171 of the regulations. For these reasons, this document amends section (G) of Appendix B to Part 171 on an interim basis by adding a reference to "transshipment in the case of textiles and textile products affecting a country of origin determination" as an aggravating factor. Although this change is effective for merchandise entered, or withdrawn from warehouse for consumption, on or after April 1, 1994, Customs will consider any comments submitted either in response to this document or in response to the solicitation of public comments on the overall revision of Appendix B referred to above.

COMMENTS

Before adopting this interim amendment as a final rule, consideration will be given to any written comments (preferably in triplicate) timely

submitted to Customs. Comments submitted will be available for public inspection in accordance with the Freedom of Information Act (5 U.S.C. 552), § 1.4, Treasury Department Regulations (31 CFR 1.4), and § 103.11(b), Customs Regulations (19 CFR 103.11(b)), on regular business days between the hours of 9 a.m. and 4:30 p.m. at the Regulations Branch, Office of Regulations and Rulings, Franklin Court, 1099 14th Street, N.W., Suite 4000, Washington, D.C.

INAPPLICABILITY OF NOTICE AND DELAYED EFFECTIVE DATE REQUIREMENTS

Because this amendment constitutes a general statement of policy, the public notice requirements of 5 U.S.C. 553(b)(A) do not apply and, for the same reason pursuant to 5 U.S.C. 553(d)(2), a delayed effective date is not required.

EXECUTIVE ORDER 12866

This document does not meet the criteria for a "significant regulatory action" as specified in Executive Order 12866.

REGULATORY FLEXIBILITY ACT

Because no notice of proposed rulemaking is required for an interim action, the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.)* do not apply.

LIST OF SUBJECTS IN 19 CFR PART 171

Administrative practice and procedure, Customs duties and inspection, Law enforcement, Penalties, Seizures and forfeitures.

AMENDMENT TO 19 CFR CHAPTER I

Part 171, Customs Regulations (19 CFR Part 171), is amended as set forth below:

PART 171—FINES, PENALTIES, AND FORFEITURES

1. The authority citation for Part 171 continues to read in part as follows:

Auhtority: 19 U.S.C. 66, 1592, 1618, 1624.

* * * * * * *

2. Appendix B to Part 171 is amended by revising section (G) to read as follows:

APPENDIX B TO PART 171—CUSTOMS REGULATIONS, REVISED PENALTY GUIDELINES, 19 U.S.C. 1592

* * * * * * *

(G) AGGRAVATING FACTORS

Certain factors may be determined to be aggravating factors in arriving at the final administrative penalty decision. Examples of aggravating factors include obstructing the investigation, withholding evidence, providing misleading information concerning the violation, transship-

ment in the case of textiles and textile products affecting a country of origin determination, and prior substantive violations of section 592 for which a final administrative finding of culpability has been made.

* * * * * * *

SAMUEL H. BANKS,
Acting Commissioner of Customs.

Approved: March 18, 1994.
JOHN P. SIMPSON,
Deputy Assistant Secretary of the Treasury.

[Published in the Federal Register, March 30, 1994 (59 FR 14745)]

(T.D. 94–30)

CUSTOMS APPROVAL OF ACCUTEST SERVICES, INC., AS A COMMERCIAL GAUGER

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of approval of accutest services, Inc., as a commercial gauger.

SUMMARY: Accutest Services, Inc., of Corpus Christi, Texas has recently applied to U.S. Customs for approval to gauge imported petroleum, petroleum products, organic chemicals and vegetable and animal oils under Part 151.13 of the Customs Regulations (19 CFR 151.13). Customs has determined that Accutest Services, Inc., meets all of the requirements for approval as a commercial gauger.

Therefore, in accordance with Part 151.13(f) of the Customs Regulations, Accutest Services, Inc. is approved to gauge the products named above in all Customs districts.

EFFECTIVE DATE: March, 22, 1994.

FOR FURTHER INFORMATION CONTACT: Ira S. Reese, Chief, Technical Branch, Office of Laboratories and Scientific Services, U.S. Customs Service, 1301 Constitution Avenue NW, Washington, D.C. 20229 at (202)927–1060.

Dated: March 25, 1994.

GEORGE D. HEAVEY,
Director,
Office of Laboratories and Scientific Services.

[Published in the Federal Register, April 4, 1994 (59 FR 15805)]

(T.D. 94–31)

EXTENSION OF E. W. SAYBOLT & CO., INC.'S CUSTOMS LABORATORY ACCREDITATION TO THE SITE LOCATED IN GUAYANILLA, PUERTO RICO

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of the extension of E. W. Saybolt & Co., Inc.'s Customs laboratory accreditation to include their Guayanilla, Puerto Rico, new laboratory facility.

SUMMARY: E. W. Saybolt & Co., Inc., of Kenilworth, New Jersey, a Customs approved gauger and accredited laboratory under Section 151.13 of the Customs Regulations (19 CFR 151.13), has been given an extension of its Customs gauger approval and laboratory accreditation to include the Guayanilla, Puerto Rico site. Specifically, the extension given to the Guayanilla site will include the approval to gauge petroleum and petroleum products, organic compounds in bulk and liquid form and animal and vegetable oils; and accreditation to perform the following laboratory analyses: API gravity, sediment and water by centrifuge, distillation characteristic, Saybolt Universal Viscosity, sediment by extraction and sulfur percent by weight.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Part 151 of the Customs Regulations provides for the acceptance at Customs Districts of laboratory analyses and gauging reports for certain products from Customs accredited commercial laboratories and approved gaugers. E. W. Saybolt & Co., Inc., a Customs commercial approved gauger and accredited laboratory, has applied to Customs to extend certain laboratory accreditations to its Guayanilla, Puerto Rico site, a Customs gauger approved facility. Review of the qualifications of the Guayanilla site shows that the extension is warranted and, accordingly, has been granted.

LOCATION

E.W. Saybolt Co., Inc., Guayanilla site is located at Route 127, Km. 13.4, Guayanilla, Puerto Rico, 00656.

EFFECTIVE DATE: March 23, 1994.

FOR FURTHER INFORMATION CONTACT: Ira S. Reese, Chief, Technical Branch, Office of Laboratories and Scientific Services, U.S. Customs Service, 1301 Constitution Ave., NW, Washington, D.C. 20229 at (202) 927–1060.

Dated: March 28, 1994.

GEORGE D. HEAVEY,
Director,
Office of Laboratories and Scientific Services.

[Published in the Federal Register, April 4, 1994 (59 FR 15805)]

19 CFR Part 24

(T.D. 94–32)

AD VALOREM USER FEE FOR IMPORTED MERCHANDISE; CONFORMING AMENDMENT

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule.

SUMMARY: This document conforms the Customs Regulations to the current merchandise processing fee rate of 0.19 percent ad valorem applicable to formal entries and releases of imported merchandise occurring on or after October 1, 1992.

EFFECTIVE DATE: March 31, 1994.

FOR FURTHER INFORMATION CONTACT: Linda Walfish, User Fee Task Force, (202–927–1167).

SUPPLEMENTARY INFORMATION:

Background

By a document published in the Federal Register as T.D. 92–89 on September 16, 1992 (57 FR 42697), in accordance with the requirements of § 8101 of the Omnibus Budget Reconciliation Act of 1986 (Pub. L. 99–509, codified as 19 U.S.C. 58c), Customs gave notice that the merchandise processing fee rate on formal entries and releases of imported merchandise was adjusted at 0.19 percent ad valorem.

The notice indicated, among other things, that the adjusted merchandise processing fee rate of 0.19 percent ad valorem was applicable to formal entries and releases of imported merchandise occurring on or after October 1, 1992, and that this fee rate would remain in effect unless otherwise adjusted pursuant to 19 U.S.C. 58c(a)(9)(B).

Accordingly, Customs is hereby making a routine, conforming amendment to § 24.23(b)(1)(i)(A) of its regulations (19 CFR 24.23(b)(1)(i)(A)), in order to reflect this previous change in the merchandise processing fee rate.

Inapplicability of Public Notice and Comment and Delayed Effective Date Requirements, the Regulatory Flexibility Act, and Executive Order 12866

Inasmuch as this amendment merely conforms the Customs Regulations to existing law and practice as noted above, pursuant to 5 U.S.C. 553(b)(B), notice and public procedure thereon are unnecessary, and pursuant to 5 U.S.C. 553(d)(3), a delayed effective date is not required. Since this document is not subject to the notice and public procedure requirements of 5 U.S.C. 553, it is not subject to the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). Nor does the amendment meet the criteria for a "significant regulatory action" as specified in E.O. 12866.

DRAFTING INFORMATION

The principal author of this document was Russell Berger, Regulations Branch, U.S. Customs Service. However, personnel from other offices participated in its development.

LIST OF SUBJECTS IN 19 CFR PART 24

Accounting, Canada, Customs duties and inspection, Financial and accounting procedures, Reporting and recordkeeping requirements, Trade agreements, User fees.

AMENDMENT TO THE REGULATIONS

Part 24, Customs Regulations (19 CFR part 24), is amended as set forth below.

PART 24—CUSTOMS FINANCIAL AND ACCOUNTING PROCEDURE

1. The general authority for part 24 and the specific sectional authority for § 24.23 continue to read as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 58a–58c, 66, 261, 267, 1202 (General Note 17, Harmonized Tariff Schedule of the United States (HTSUS)), 1450, 1624; 31 U.S.C. 9701, unless otherwise noted.

* * * * * * *

Section 24.23 also issued under Pub. L. 99–272, Pub. L. 99–509;

* * * * * * *

2. In § 24.23, the first sentence of paragraph (b)(1)(i)(A) is amended by removing "0.17" where appearing therein, and adding in its place, "0.19".

Dated: March 28, 1994.

HARVEY B. FOX,
Director,
Office of Regulations and Rulings.

[Published in the Federal Register, March 31, 1994 (59 FR 15046)]

(T.D. 94–33)

TUNA FISH—TARIFF-RATE QUOTA

THE TARIFF-RATE QUOTA FOR THE CALENDAR YEAR 1994, ON TUNA CLASSIFIABLE UNDER ITEM 1604.14.20, HARMONIZED TARIFF SCHEDULE OF THE UNITED STATES (HTSUS)

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Announcement of the quota quantity for tuna for Calendar Year 1994.

SUMMARY: Each year the tariff-rate quota for tuna fish described in item 1604.14.20, HTSUS, is based on the United States canned tuna production for the preceding calendar year.

EFFECTIVE DATES: The 1994 tariff-rate quota is applicable to tuna fish entered, or withdrawn from warehouse, for consumption during the period January 1 through December 31, 1994.

FOR FURTHER INFORMATION CONTACT: Karen L. Cooper, Chief, Quota Branch, Entry Division, Office of Trade Operations, Office of Comercial Operations, U.S. Customs Service, Washington, D.C. 20229, (202–927–5401). It has now been determined that 33,245,716 kilograms of tuna may be entered for consumption or withdrawn from warehouse for consumption during the Calendar Year 1994, at the rate of 6 percent ad valorem under item 1604.14.20, HTSUS. Any such tuna which is entered, or withdrawn from warehouse, for consumption during the current calendar year in excess of this quota will be dutiable at the rate of 12.5 percent ad valorem under item 1604.14.20, HTSUS.

Dated: March 28, 1994.

GEORGE J. WEISE,
Commissioner.

[Published in the Federal Register, April 4, 1994 (59 FR 15806)]

---

19 CFR Part 181

(T.D. 94–1)

NORTH AMERICAN FREE TRADE AGREEMENT; CORRECTIONS

RIN 1515–AB33

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Interim regulations; corrections.

SUMMARY: This document makes corrections to the document published in the Federal Register which set forth interim amendments to the Customs Regulations to implement the preferential tariff treatment and other Customs-related provisions of the North American Free Trade Agreement and the North American Free Trade Agreement Implementation Act.

EFFECTIVE DATE: These corrections are effective January 1, 1994.

FOR FURTHER INFORMATION CONTACT: John Valentine, Office of Regulations and Rulings (202–482–7000).

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 30, 1993, Customs published in the Federal Register (58 FR 69460) T.D. 94–1 to set forth interim amendments to the Customs Regulations to implement the preferential tariff treatment and other Customs-related provisions of the North American Free Trade Agreement (NAFTA) which was adopted by the United States through the enactment of the North American Free Trade Agreement Implementation Act, Public Law 103–182, 107 Stat. 2057. Those interim regulatory amendments took effect on January 1, 1994, to coincide with the effective date of the NAFTA.

The majority of the NAFTA regulations were set forth in T.D. 94–1 as a new Part 181 which included, as an Appendix thereto, substantively verbatim, trilaterally negotiated texts implementing the rules of origin provisions of Chapter Four of the NAFTA. This document makes some corrections to the Appendix to Part 181 as published in T.D. 94–1. These corrections involve (1) textual changes to properly reflect the trilaterally agreed texts and (2) formatting changes resulting from manuscript or typesetting errors.

CORRECTIONS OF PUBLICATION

The document published in the Federal Register as T.D. 94–1 on December 30, 1993 (58 FR 69460) is corrected as set forth below.

1. On page 69497, in the definition of "customs value", paragraph (c) is corrected by adding the words "as amended," before the word "converted" in the second line.

2. On page 69498, in the definition of "heavy-duty vehicle", at the end of the first line, the figure "8702.10.30" is corrected to read "8702.90.30".

3. On page 69501, under section 2, the words **"References to domestic laws"** are added as a centered heading before subsection (5).

4. On page 69503, under section 5, subsection (1), the words "provided that", which appear as the third line of paragraph (b), should be flush with the left margin of subsection (1).

5. On page 69507, under section 6, the last three lines under subsection (7), which begin with the words "the exporter or producer may choose", should be flush with the left margin of subsection (7).

6. On page 69509, under section 6, subsection (20), in the list of figures within Example 4, the sign "$" is added before the figure "12.00" opposite "Total excluded costs".

7. On page 69511, under section 7, subsection (1), the line beginning with the words "and shall include", which appears as the last line of paragraph (b), should be flush with the left margin of subsection (1).

8. On page 69512, under section 7, the heading to subsection (2) is corrected by removing the word "use" and adding, in its place, the words "require valuation under".

9. At the top of page 69513, under section 7, the heading to subsection (11) is corrected by removing the words "deemed to be originating" and adding, in their place, the words "origin disregarded".

10. On page 69514, under section 7, subsection (17), Example 2, Situation 1 is corrected by removing the double line under the figure "$23.00" opposite "Total cost of Good B" and adding a minus sign ("–") before the figure "0.20" in the next line opposite "Excluded costs: (included in period costs)".

11. On page 69515, under section 7, subsection (17), Example 2, the third group of figures under Situation 2 is corrected by adding a minus sign ("–") before the figure "0.40" in the column headed "Total".

12. On page 69516, under section 7, subsection 17:

a. The table at the top of the page is corrected by adding a minus sign ("–") before the figure "0.20" in the column headed "Total"; and

b. The first paragraph of Example 4 is corrected by removing the reference "Material A" in the second line and adding, in its place, the reference "Material X".

13. On page 69518, under section 9, subsection (2), the last two lines under subparagraph (c)(ii), which begin with the words "the sum of the customs value", should be flush with the left margin of paragraph (c).

14. On page 69519, under section 9, subsection (2):

a. At the top of the page, the last two lines under subparagraph (d)(ii), which begin with the words "the sum of", should be flush with the left margin of paragraph (d);

b. The last two lines under subparagraph (e)(ii), which begin with the words "the value of the traced material", should be flush with the left margin of paragraph (e);

c. The third line under subparagraph (f)(ii), which reads "an amount equal to VM × (1-RVCR)", should be flush with the left margin of paragraph f);

d. In paragraph (g), the paragraph designation and the first two lines of the paragraph, and the last two lines under subparagraph (g)(ii) which begin with the words "if the producer of the good", should be flush with the left margin of paragraphs (a) through (f); and

e. Paragraph (h) should be flush with the left margin of paragraphs (a) through (g).

15. Also on page 69519, under section 9:

a. The heading to subsection (3) is corrected by removing the word "use" and adding, in its place, the words "require valuation under";

b. The heading to subsection (4) is corrected by adding the word "customs" before the word "value" appearing at the end of the heading; and

c. In subsection (5), the text under paragraph (b) beginning with the words "and, where" in the third line should be flush with the left margin of subsection (5).

16. On page 69520, under section 9, subsection (9), the word "and" is removed at the end of paragraph (d), the period at the end of paragraph

(e) is replaced by a semicolon followed by the word "and", and a new paragraph (f) is added to read as follows:

(f) any information set out in a statement referred to in subsection (2) that concerns the value of materials or costs shall be in the same currency as the currency of the country in which the person who provided the statement is located.

17. On page 69523, under section 10, subsection (1), paragraph (d):

a. The last four lines of subparagraph (i)(D), which begin with the words "if the producer has", should be flush with the left margin of subparagraph (i); and

b. In the third line of subparagraph (ii), the word "where" should be flush with the left margin of subparagraph (ii).

18. On page 69524, under section 10:

a. In subsection (1), paragraph (d), subparagraph (ii), the first four lines at the top of the page should be flush with the left margin of subparagraph (ii); and

b. In subsection (4), the last two lines, which begin with the words "the value of the", should be flush with the left margin of subsection (4).

19. At the top of page 69525 under section 10, the words **"VNM may be redetermined for certain acquired materials"** are added as a centered heading before subsection (6).

20. Also on page 69525, under section 10, subsection (9), the word "and" is removed at the end of paragraph (c), the period at the end of paragraph (d) is replaced by a semicolon followed by the word "and", and a new paragraph (e) is added to read as follows:

(e) any information set out in a statement referred to in subsection (2) that concerns the value of materials or costs shall be in the same currency as the currency of the country in which the person who provided the statement is located.

21. On page 69529, under section 11:

a. In subsection (6), in the second line the reference to "Schedule V.1" is corrected to read "Schedule VI";

b. In subsection (7), in the first line the reference to "Schedule V.1" is corrected to read "Schedule VI"; and

c. The words **"Averaged net cost and VNM included in calculation of RVC on the basis of producer's option to include all vehicles of category or only certain exported vehicles of category"** are added as a centered heading before subsection (9).

22. On page 69530, under section 12:

a. In subsection (1), in the third line the word "elects" is corrected to read "chooses";

b. In subsection (3), the last two lines, which begin with the words "shall be the sum of", should be flush with the left margin of subsection (3); and

c. In the heading to subsection (6), the reference "VNM" is added after the word "averaging".

23. On page 69531, under section 13:

a. In the heading to subsection (2), the word "retrofit" is corrected to read "refit"; and

b. In subsection (4), in the third line the words "an election" are corrected to read "a choice".

24. On page 69533, under section 14, subsection (4), the word "and" is removed at the end of paragraph (a)(ii), the period at the end of paragraph (b) is replaced by a semicolon followed by the word "and", and a new paragraph (c) is added to read as follows:

(c) any information set out in a statement referred to in subsection (2) that concerns the value of materials or costs shall be in the same currency as the currency of the country in which the person who provided the statement is located.

25. On page 69537, under Schedule I, the following words are added before the period at the end of the sentence: "as implemented in General Note 12 of the HTSUS".

26. On page 69538, under Schedule II, section 4:

a. In subsection (6), paragraph (h), in the second line the word "material" is corrected to read "good"; and

b. In subsection (12), in the sixth and eighth lines the word "mould" in each case is corrected to read "mold".

27. On page 69542, under Schedule VI, section 2, in the third line the word "elect" is corrected to read "choose".

28. On page 69543, under Schedule VI, section 5, subsection (1), paragraph (b), in the first line the reference to "section 2.1" is corrected to read "section 3".

29. On page 69550, under Schedule VIII, section 5, subsection (6), paragraph (d), the text beginning with the words "and shall in-" in the second line and continuing to the end of the paragraph should start on a separate line flush with the left margin of subsection (6).

30. At the top of page 69551, under Schedule VIII, section 5, subsection (12), in the sixth and eighth lines the word "mould" in each case is corrected to read "mold".

31. Also on page 69551, under Schedule VIII:

a. In section 6, subsection (1), in the second line the reference to "Part III" is corrected to read "Part IV";

b. In section 7, subsection (1), in the third line the reference to "Part III" is corrected to read "Part IV"; and

c. In section 8, in the third line the reference to "Part III" is corrected to read "Part IV".

32. On page 69552, under Schedule VIII:

a. In section 9, subsection (1), in the third line the reference to "Part III" is corrected to read "Part IV"; and

b. In section 10, subsection (1), in the second line the reference to "Part III" is corrected to read "Part IV".

33. On page 69553, under Schedule VIII:

a. In section 10, subsection (3), in the last line the reference to "Schedule VI" is corrected to read "Schedule XII"; and

b. In section 11, subsection (1), in the third line the reference to "Part III" is corrected to read "Part IV".

34. On page 69557, under Schedule X, in subsection (1) under each of sections 6, 7 and 8, the word "by", which occupies the line between paragraphs (a) and (b), should be flush with the left margin of subsection (1).

35. On page 69558, under Schedule X, section 14, subsection (1), the word "by", which occupies the line between paragraphs (a) and (b), should be flush with the left margin of subsection (1).

36. On page 69563, under Schedule XI, Addendum, first example, the texts of footnotes 1 through 5 should be moved to the end of the example.

Dated: March 24, 1994.

HARVEY B. FOX,
Director,
Office of Regulations and Regulations.

[Published in the Federal Register, March 31, 1994 (59 FR 15047)]

---

19 CFR Part 175

(T.D. 94–5)

COUNTRY OF ORIGIN MARKING FOR PACKAGED FROZEN PRODUCE; SUSPENSION OF DATE FOR COMPLIANCE

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of suspension of compliance date.

SUMMARY: This document gives notice that Customs is suspending the compliance date for T.D. 94–5, which was published in the Federal Register (58 FR 68743) on December 29, 1993. T.D. 94–5 was a final interpretive rule concerning the country of origin marking requirements for retail packages containing imported frozen produce. As numerous companies and trade organizations have objected that the compliance date set forth in that document is impracticable, Customs is suspending the compliance date, pending a determination based on comments received in response to another document published in today's Federal Register.

EFFECTIVE DATE: This suspension of the May 8, 1994 compliance date for T.D. 94–5 is effective March 29, 1994.

FOR FURTHER INFORMATION CONTACT: Robert Cascardo, Value and Marking Branch, Office of Regulations and Rulings, U.S. Customs Service, (202) 482–7010.

SUPPLEMENTARY INFORMATION

BACKGROUND

On December 29, 1993, pursuant to section 516 of the Tariff Act of 1930, as amended, Customs issued T.D. 94–5, a Decision and Final Interpretive Rule concerning the country of origin marking requirements for retail packages containing imported frozen produce. 58 FR 68743 (December 29, 1993). In T.D. 94–5, Customs reversed a previous determination and ruled that country of origin marking must appear on the front panel of such packages in specified type face and size. The legally effective date of the determination was February 11, 1994. However, parties adversely affected by the final interpretive rule were allowed until May 8, 1994, to bring their imported frozen packaging into compliance.

Numerous individual companies and several trade organizations objected that even this extended date for compliance is impracticable, and have requested suspension of the May 8, 1994, compliance date.

In accordance with these requests, Customs is suspending the May 8, 1994, effective date for parties adversely affected by compliance obligations under T.D. 94–5. In a companion document to be published today in the Federal Register, Customs is giving public notice of its intention to adopt a new compliance date of January 1, 1995. Public comment is being requested on both the date for compliance with the requirement to place country of origin marking on the front panels of produce packaging, and on the specifications regarding type size and style set forth in T.D. 94–5.

AUTHORITY

This notice is published in accordance with 19 U.S.C. 1516 and parts 134 and 175, Customs Regulations (19 CFR part 134; 19 CFR part 175).

DRAFTING INFORMATION

The principal drafter of this document was Robert Cascardo, Value and Marking Branch, U.S. Customs Service. Personnel from other Customs offices participated in its development.

SAMUEL H. BANKS,
Acting Commissioner of Customs.

Approved: March 21, 1994.

JOHN P. SIMPSON,
Deputy Assistant Secretary of the Treasury.

[Published in the Federal Register, March 29, 1994 (59 FR 14548)]

U.S. Customs Service

General Notices

19 CFR Parts 134 and 175

COUNTRY OF ORIGIN MARKING FOR FROZEN PRODUCE; IMPLEMENTATION OF T.D. 94–5; SOLICITATION OF COMMENTS ON NEW EFFECTIVE DATE AND SIZE AND STYLE OF MARKING

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Proposal for new compliance date and adoption of specifications for type size and style of marking; solicitation of comments.

SUMMARY: In another document published in today's Federal Register, Customs has suspended the compliance date for T.D. 94–5, regarding country of origin marking requirements for retail packages containing frozen produce. In this document, Customs is proposing a new compliance date and is requesting comments on both the proposed compliance date and on the specifications regarding type size and style set forth in T.D. 94–5.

DATES: Comments must be received on or before May 31, 1994.

ADDRESSES: Comments (preferably in triplicate) may be submitted to the U.S. Customs Service, Regulations Branch, Office of Regulations and Rulings (Franklin Court), 1301 Constitution Avenue, N.W., Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: Robert Cascardo, Value and Marking Branch, Office of Regulations and Rulings, U.S. Customs Service, (202) 482–7010.

SUPPLEMENTARY INFORMATION

BACKGROUND

On December 29, 1993, pursuant to section 516 of the Tariff Act of 1930, as amended, Customs issued T.D. 94–5, a Decision and Final Interpretive Rule concerning the country of origin marking requirements for retail packages containing imported frozen produce. 58 FR 68743 (December 29, 1993). Customs issued T.D. 94–5 after publishing a Notice of Domestic Interested Party Petition under section 516, Tariff

Act of 1930, as amended (19 U.S.C. 1516) and Part 175, Customs Regulations (19 CFR Part 175) and after having reviewed the submitted public comments. The Notice solicited public comments on the issues raised by the domestic interested parties, i.e. whether the nature of frozen produce packaging required specified marking on the front panel to indicate the country of origin in a manner that would satisfy the requirements of conspicuousness and legibility. After consideration of the public comments received, Customs reversed a previous determination and ruled that country of origin marking must appear on the front panel of such packages in specified type size and style.

The Decision on the section 516 Petition essentially agreed with the prior opinion of the Court of International Trade in Norcal/Crosetti Foods, Inc., et al. v. U.S. Customs Service, 758 F. Supp. 729 (1991). In particular, Customs agreed with the Court that both the location and the legiblity of the country of origin marking on these products were deficient. The detailed specifications for type size and lettering of marking announced by Customs were intended as a definitive resolution of the legibility issue. These specifications were provided in part because the Court, in addition to requiring that marking appear on the front or most prominent panel of the package, also required that marking be placed on that panel in a conspicuous manner, keeping in mind the common meaning of that term. The determination became legally effective on February 11, 1994. However, parties adversely affected by the final interpretive rule were allowed until May 8, 1994, to bring their imported frozen packaging into compliance.

With the suspension by Customs of the effective date for compliance by another document published in today's Federal Register, there will now be opportunity for further consideration of type sizes and styles. The specifications set forth in the December 29, 1993, Decision and Final Interpretive Rule, at Federal Register page 68747, are to be considered for purposes of this Notice as proposed specifications which Customs will reconsider in light of the comments received.

Public comment is requested on both the date after which country of origin marking on the front panels of produce packaging will be required for all persons, and on the specifications regarding type size and style set forth in T.D. 94–5. Customs proposes to make the requirement of front panel marking effective on January 1, 1995.

Upon completion of the comment period and additional consideration, Customs plans to issue a determination setting forth final specifications on type size and style, and setting new dates for compliance with T.D. 94–5.

COMMENTS

All comments received in response to this notice will be available for public inspection in accordance with the Freedom of Information Act (5 U.S.C. 552), section 1.4, Treasury Department Regulations (31 CFR 1.4), and section 103.11(b), Customs Regulations (19 CFR 103.11(b)), on regular business days between the hours of 9:00 a.m. and 4:00 p.m. at

the Regulations Branch, Suite 4000, Franklin Court, 1099 14th Street, N.W., Washington, D.C.

AUTHORITY

This notice is published in accordance with 19 U.S.C. 1304(a), 19 U.S.C. 1516, and sections 134.42 and 134.44, Customs Regulations (19 CFR 134.42; 19 CFR 134.44).

DRAFTING INFORMATION

The principal drafter of this document was Robert Cascardo, Value and Marking Branch, U.S. Customs Service. Personnel from other Customs offices participated in its development.

SAMUEL H. BANKS,
Acting Commissioner of Customs.

Approved: March 21, 1994.

JOHN P. SIMPSON,
Deputy Assistant Secretary of the Treasury.

[Published in the Federal Register, March 29, 1994 (59 FR 14579)]

PUBLIC MEETINGS ON CUSTOMS "MOD ACT"

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of meetings.

SUMMARY: This notice announces the scheduling of four public meetings on the Customs "Mod Act" and informs the public of the agency's intention to hold several more public meetings at other locations at later dates. The scheduled meetings will be held in (1) San Francisco, California, (2) New Orleans, Louisiana, (3) New York City, New York, and (4) Newark, New Jersey. The purpose of these meetings is to (1) give Customs managers an opportunity to share "strawmen" implementation proposals relating to carrier manifest requirements and entry and clearance procedures, and (2) give participants an opportunity to ask questions, make suggestions, and provide the Customs Service with informal input relative to implementation of Title VI of the North American Free Trade Agreement Implementation Act (Public Law 103–182, 107 Stat. 2057, codified at 19 U.S.C. 3301 note). To control attendance, those planning to attend are requested to notify Customs in advance.

DATES: In San Francisco, California, April 26, 1994; in New Orleans, Louisiana, May 6, 1994; in New York City, New York, May 24, 1994, and; in Newark, New Jersey, May 25, 1994. All meetings are scheduled from 8:30 a.m. to 2:00 p.m.

ADDRESSES: In San Francisco, at the South San Francisco Conference Center, 255 S. Airport Boulevard, South San Francisco, California; in New Orleans, at the Marriott Hotel, 555 Canal Street, New Orleans, Louisiana; in New York City, at the Customs Main Conference Room—2d Floor, Building 77, JFK Airport, New York City, New York, and; in Newark, at the Customs Main Conference Room—3d Floor, Hemisphere Center, Newark, New Jersey.

FOR FURTHER INFORMATION CONTACT: Debra Rutter, Office of Inspection and Control, U.S. Customs Service, 1301 Constitution Avenue, N.W., Washington, D.C. 20229. Phone: (202) 927–0510; FAX: (202) 927–1356.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, the President signed the "North American Free Trade Agreement Implementation Act." The Customs modernization portion of this Act (Title VI of Public Law 103–182), popularly known as the Customs Modernization Act or "Mod Act," became effective when it was signed. In order to share "strawmen" implementation proposals specific to carrier manifest requirements and entry and clearance procedures and invite informal dialogue relative to implementation plans and issues, Customs will hold open meetings in (1) San Francisco on April 26, 1994, at the South San Francisco Conference Center, 255 S. Airport Boulevard, South San Francisco, California; (2) New Orleans on May 6, 1994, at the Marriott Hotel, 555 Canal Street, New Orleans, Louisiana; (3) New York City on May 24, 1994, at the Customs Main Conference Room, Building 77, JFK Airport, New York City, New York, and; (4) Newark on May 25, 1994, at the Customs Main Conference Room, Hemisphere Center, Newark, New Jersey. All meetings are scheduled from 8:30 a.m. to 2:00 p.m.

Between 8:30 a.m. and 9:15 a.m., a general briefing covering the Office of Inspection and Control's operational, automation and enforcement issues will be conducted. Following the general briefing, staff members from the Office of Inspection and Control will conduct a series of presentations concentrating on vessel, air, truck and rail transportation proposals for implementing specific Mod Act provisions. Among the topics to be discussed at these sessions will be: carrier manifest requirements, electronic transmission of data, carrier entry and clearance procedures, and carrier liability issues. Participants will be given ample opportunity to ask questions and provide suggestions during this session.

Persons planning to attend are requested to pre-register by FAX with the local contact listed below. Individuals not having access to facsimile equipment may pre-register by calling the following local contacts:

For the San Francisco Meeting: Mr. Thomas O'Brien, Telephone: (415) 705–4340, Fax: (415) 705–4334.

For the New Orleans Meeting: Ms. Joell Johnson, Telephone: (589–6323, Fax: (504) 589–7305.
For the New York City and Newark Meetings: Ms. Susan Mitchell, Telephone: (212) 466–4500, Fax: (212) 466–4507.

Attendees are encouraged to arrive approximately 15 minutes in advance of the meeting.

Customs intends to hold similar public meetings at the following locations: Chicago, Illinois, and Washington, D.C. Other locations are still being considered. The dates, times, and locations of these public meetings will be published in the Federal Register at a later date.

Dated: March 25, 1994.

HARVEY B. FOX,
Director,
Office of Regulations and Rulings.

[Published in the Federal Register, April 1, 1994 (59 FR 15498)]

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, D.C., March 29, 1994.

The following documents of the United States Customs Service, Office of Commercial Operations, Office of Regulations and Rulings, have been determined to be of sufficient interest to the public and U.S. Customs Service field offices to merit publication in the CUSTOMS BULLETIN.

HARVEY B. FOX,
Director,
Office of Regulations and Rulings.

PROPOSED REVOCATION OF CUSTOMS RULING LETTER RELATING TO ELIGIBILITY OF CIGAR SCRAP TOBACCO FOR DUTY-FREE TREATMENT UNDER THE CBERA

ACTION: Notice of proposed revocation of ruling letter concerning the eligibility of cigar scrap tobacco for duty-free treatment under the Caribbean Basin Economic Recovery Act (CBERA).

SUMMARY: Pursuant to section 625(c)(1) of the Customs Modernization Act, Public Law 103–82, 107 Stat. 437, December 8, 1993, this notice advises interested parties that Customs intends to revoke a ruling pertaining to the eligibility of cigar scrap tobacco for duty-free treatment under the CBERA.

DATE: Comments must be received on or before May 13, 1994.

ADDRESS: Written comments are to be addressed to U.S. Customs Service, Office of Regulations and Rulings, Attention: Special Classification Branch, 1301 Constitution Avenue, N.W., (Franklin Court), Washington, D.C. 20229. Comments submitted may be inspected at the Commercial Rulings Division, Office of Regulations and Rulings, located at Franklin Court, 1099 14th Street, N.W., Suite 4000, Washington, D.C.

FOR FURTHER INFORMATION CONTACT: Wende Schuster, Special Classification Branch (202) 482–6980.

SUPPLEMENTARY INFORMATION:

BACKGROUND

In HRL 553120 dated September 28, 1984, Customs held that cigar leaf tobacco imported into the Dominican Republic and processed into cigar scrap tobacco qualified for duty-free treatment under the CBERA. Customs held in another case involving the hand-stripping of leaf tobacco in a CBERA BC (HRL 557192 dated July 14, 1993), that this operation did not constitute a substantial transformation of the stripped tobacco into a "product of" a BC, and therefore, the stripped tobacco did not qualify for the duty exemption under the CBERA when imported into the U.S. It is in the context of the reconsideration by Customs of HRL 557192, that we have decided to revoke HRL 553120.

Customs held that the steps involved in the production of the cigar scrap tobacco in HRL 553120 constituted a substantial transformation of the imported tobacco into a "product of" the Dominican Republic. In making this determination, we stated that the reduction of nicotine, mellowing of the tobacco, and chemical changes, supplemented with frequent quality control tests, various machines and other equipment used in the manufacturing process which required some degree of technical skill on the part of the Dominican workers, and the significant amount of time required for the entire production process, were substantial manufacturing operations which resulted in a substantial transformation of the imported tobacco into a "product of" the Dominican Republic. *See also* HRL 553825 dated February 4, 1986. A copy of HRL 553120 is set forth in Attachment A to this document.

Upon further consideration, it is Customs opinion that leaf tobacco which is hand-stripped in a beneficiary country does not undergo a substantial transformation into a "product of" that beneficiary country. It is Customs determination that the very essence of the final product is imparted by the tobacco, prior to any additional processes performed in the beneficiary country. Those operations performed in the beneficiary country which include cleaning, conditioning the tobacco, hand-stripping, drying, etc., do not change the fundamental character or use of the tobacco in its exported condition. Therefore, we believe that HRL 553120 should be revoked.

Before taking this action, consideration will be given to any written comments timely received. The proposed ruling revoking HRL 553120 is set forth in Attachment B to this document.

Claims for detrimental reliance under section 177.9, Customs Regulations (19 CFR 177.9), will not be entertained for actions occurring on or after the date of publication of this notice.

Dated: March 17, 1994.

SANDRA L. GETHERS,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, D.C., September 28, 1994.

CLA–2 CO:R:CV:V
553120 KP

(NAME and address)

This is with reference to your letter dated May 11, 1984, submitted on behalf of your client (name) wherein you requested a ruling that cigar scrap tobacco imported from the Dominican Republic qualifies for duty-free treatment pursuant to the Caribbean Basin Initiative (CBI) under the circumstances described below.

The cigar scrap tobacco for which duty-free treatment under the CBI is sought would be manufactured in the Dominican Republic as follows:

1. Containers of cigar leaf tobacco of both Dominican and foreign origin would be placed in a vacudyne machine. This machine creates a vacuum into which steam is introduced for complete penetration of the tobacco leaves, adding moisture required for processing the tobacco.

2. Leaf tobacco of various grades would then be put into blending boxes where the leaves would be blended.

3. After blending, the tobacco leaves would be placed in sweat boxes for up to two weeks under high temperature and moisture. In this environment, nicotine would be reduced, the tobacco would mellow, and objectionable elements would be reduced by chemical changes that occur.

4. Next, the cigar tobacco leaves would be placed in cutting machines which cut the whole leaves into particles varying from five to ten inches in length.

5. The resulting pieces would be further steamed, moisturized, and pressed in metering tubes.

6. The tobacco pieces would then be put in conditioning cylinders where more steam and moisture would be introduced and the pieces would be mixed. In some cases, additives would be applied during this step.

7. & 8. The tobacco pieces would then be run through a series of threshers and separators which strip the lamina of the tobacco particles off the stem and separate the lamina from the stem by means of air suction. The resulting pieces of tobacco would generally be smaller than one inch in size.

9. The resulting tobacco pieces would then be run over vibrating screens to remove very fine particles detrimental to cigar manufacture.

10. Next, the particles would be put in drying chambers to reduce the moisture content of the tobacco from the level of approximately 25 percent necessary for processing to 13 to 15 percent for cigar manufacturing.

11. The processed tobacco would then be packed.

During the process described above, the tobacco would be subject to frequent testing for specific moisture level, size, stem content, and other quality control requirements.

Generally speaking, any merchandise which is imported directly from a CBI beneficiary country and which meets the country of origin criteria set forth in section 10.195, Customs Regulations (19 CFR 10.195), is eligible for duty-free treatment under the CBI. 19 CFR 10.191(b)(2). you indicated in your letter that the cigar scrap tobacco would be shipped directly to the United States from the Dominican Republic, which is a beneficiary country for purposes of the CBI. Accordingly, the eligibility of the scrap tobacco for duty-free treatment under the CBI depends on whether or not that merchandise meets the country of origin criteria found in 19 CFR 10.195.

Subsection (a) of 19 CFR 10.195 provides:

> **§ 10.195 Country of origin criteria.**
>
> (a) *Articles produced in a beneficiary country.* Any article which is either (1) wholly the growth, product, or manufacture of a beneficiary country or (2) a new or different article of commerce which has been grown, produced, or manufactured in a beneficiary country, may qualify for duty-free entry under the CBI. However, no article or material shall be considered to have been grown, produced, or manufactured in a beneficiary country by virtue of having merely undergone (i) simple combining or packaging operations, or (ii) mere dilution with water or mere dilution with another substance that does not materially alter the characteristics of the article. Moreover, duty-free entry under the CBI may be accorded to an article only if the sum of the cost or value of the materials produced in a beneficiary country or countries, plus the direct costs of processing operations performed in a beneficiary country or countries, is not less than 35 percent of the appraised value of the article at the time it is entered.

With regard to the last sentence in this subsection, you stated that in all cases, the cost or value of the indigenous Dominican tobacco plus the director costs of the processing operations in the Dominican Republic would exceed 35 percent of the appraised value of the tobacco upon its importation into the United States. Thus, the key issue arising from your inquiry is whether the cigar scrap tobacco is either (1) wholly the growth, product, or manufacture of the Dominican Republic or (2) a new or different article of commerce which has been grown, produced, or manufactured in the Dominican Republic.

Clearly, the cigar scrap tobacco cannot be considered wholly the growth, product, or manufacture of the Dominican Republic because, according to your letter, some of the leaf tobacco used in the production of the scrap tobacco would be grown in Europe and/or the Far East. Therefore, the eligibility of the scrap tobacco for duty-free treatment under the CBI depends upon whether the component leaf tobaccos are substantially transformed into a new or different article of commerce by virtue of their conversion into scrap tobacco.

A substantial transformation occurs when, by means of a substantial manufacturing or processing operation, a new and different article of commerce emerges with a name, character, or use distinct from the article or material from which it was so transformed. In this case, the merchandise subjected to the Dominican processing is cigar tobacco in leaf form; the resulting product is cigar tobacco in scrap form. The tobacco emerges from the processing with different levels of moisturization and stem content than it had as unprocessed leaf tobacco. Moreover, in step 3 of the process, nicotine is reduced, the tobacco mellows, and objectionable elements are reduced by chemical changes, which generally have been found to result in a new and different product for purposes of item 806.20, TSUS. Accordingly, in this situation, we find that the scrap tobacco is a new and different article of commerce with a character distinct from the leaf tobacco subjected to the manufacturing process. Therefore, we must determine whether the work performed in the Dominican Republic is a substantial manufacturing or processing operation in the overall production of the cigar scrap tobacco.

The types of manufacturing processes that are considered to effect a substantial transformation under the CBI are limited by the second sentence of 19 CFR 10.195(a), as quoted above. Concerning virtually identical provisions in title II of Public Law 98–67, the Caribbean Basin Economic Recovery Act, the legislative history of that Act says:

> The object of these provisions is to prevent pass-through operations in which the work performed is of little economic benefit to the Caribbean and constitutes avoidance of U.S. duties. Examples of activities that the Customs Service should consider as insufficient include * * * merely blending foreign and Caribbean tobacco, merely chopping or thrashing foreign tobacco without further manufacturing, or simply per-

forming alterations of wrapper tobacco (as under item 806.20 of the TSUS by stemming or cutting[)].

H.R. Rep. No. 98–266, 98th Cong., 1st Sess. 13 (1983) (footnote omitted). You asserted that because the process proposed by your client is a combination of all the operations specified in the legislative history as well as several others, it should therefore be viewed as one that substantially transforms foreign articles into articles of a beneficiary country for CBI purposes. However, the legislative history of the Caribbean Basin Economic Recovery Act gives no indication that by giving examples of operations that shall not satisfy the CBI country of origin criteria, Congress intended to establish a minimum standard beyond which all operations would be deemed to effect a substantial transformation under the CBI. Operations other than those specified by Congress must be evaluated on their own merits to see if they meet the CBI requirements.

Your client's proposed Dominican operation appears to be a relatively complex process. It involves eleven distinct steps supplemented with frequent quality control tests for different variables. Various machines and other equipment used in the manufacturing process require some degree of technical skill on the part of the Dominican workers. The entire production process appears to take a significant amount of time; the third step alone takes anywhere from a few days to two weeks. You did not provide us with specific cost information regarding materials, labor, and other processing or manufacturing costs. Nevertheless, the other factors we have considered indicate that the Dominican processing is a substantial manufacturing operations. Therefore, that process effects a substantial transformation of the cigar leaf tobacco into cigar scrap tobacco. As a result, the imported tobacco will be eligible for duty-free treatment under the CBI if all other applicable requirements are met.

HARVEY B. FOX,
Director,
Classification and Value Division.

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, D.C.
CLA–2 CO:R:C:S 557577 WAS
Category: Classification

MR. T. H. MITCHELL
TRAFFIC MANAGER
LANCASTER LEAF
198 West Liberty Street
P.O. Box 897
Lancaster, PA 17803

Re: Reconsideration of HRL 557192 concerning the eligibility of hand-stripped leaf tobacco for duty-free treatment under the Caribbean Basin Economic Recovery Act (CBERA).

DEAR MR. MITCHELL:

This is in response to your letter dated September 7, 1993, requesting reconsideration of Headquarters Ruling Letter (HRL) 557192 dated July 14, 1993, concerning the eligibility of handstripped leaf tobacco from a designated beneficiary country (BC) for duty-free treatment under the Caribbean Basin Economic Recovery Act (CBERA) (19 U.S.C. 2701–2706). In HRL 557192, we held that the leaf tobacco which is hand-stripped in a BC is not substantially transformed into a "product of" a BC.

Facts:

This reconsideration is based upon the additional information concerning the processing of the tobacco in the BC (possibly the Dominican Republic, Nicaragua, or Honduras) that you submitted. In this submission, you have described the operations as follows:

Upon arrival in a BC, the cartons of leaf tobacco are promptly unloaded from the ocean container. The tobacco leaves are then removed from the cartons and the indi-

vidual tobacco leaves are carefully loosened from their tangled state within the carton. Moisture is applied to each leaf using a pressurized misting device. After the moisture is evenly applied, each leaf is spread out on a grading table where it is inspected for quality, uniformity, color, and size. At this stage, all foreign materials, such as weeds, dirt, feathers, pieces of packing material, etc. are removed and discarded. The tobacco leaves are then segregated according to specified grades and placed on a fermentation bulk in an environmentally controlled "sweat" room for a period of ten days in order to raise the temperature of the tobacco to 120 degrees Fahrenheit, which conditions the tender leaves for the handstripping process. In addition to conditioning the leaves, the fermentation bulk process also lowers the nicotine content from approximately 3.19% to 2.32% and changing the color to one more acceptable to the consumer. Other chemical changes, such as the reduction of sugar content and chloride content, occur during the fermentation process which makes it more suitable for the production of chewing tobacco.

When the prescribed temperature is attained and the leaves of tobacco are deemed "ready" they are gently removed from the fermentation bulk and hand carried from the "sweat" room to the handstripping area where there is enough natural lighting to allow the workers to expertly handstrip the lamina away from the midrib (large central stem) of the leaf. (This lamina then becomes known as a tobacco "strip" in tobacco industry jargon). The hand "strips" are then positioned on specially designed inspection tables where you state that highly skilled supervisors inspect them for uniformity and quality of workmanship. The stems which have been removed are then segregated and discarded.

Next, the strips are passed over a specially designed screen which removes foreign material, especially sand. A minimum of six quality control personnel closely scrutinize this screening process to assure that nothing remains on the strips which would cause them to be rejected by a customer who intends to use the strip in a chewing tobacco product.

After the strips have been cleaned of all contaminants, another group of workers position the strips on a drying rack and move them into a controlled environment, known as a "drying" room. The "drying" room is specially designed to allow heat to force moisture from the strips and ventilate the excess moisture out and away from the strips. The moisture content of the strips must be reduced from approximately 20% to a target range of 14% to 16% in order to prevent the strip from molding during subsequent shipment to the United States. In addition to reducing the moisture content of the strips, this process has a mellowing effect on the tobacco, which is highly desirable for chewing tobacco products of this nature. This process can take from 10 to 20 days, depending upon the weather conditions, moisture content, and quality of the tobacco leaf (strip).

After the strips attain the proper moisture level, and are tested and judged to have mellowed properly, they are once more subject to inspection by the grading and quality control teams. Once approved by these teams, top graders then sort the finished strips and send them to the packing room where they are placed into a sturdy cardboard case and machine-pressed to achieve the proper weight for final shipment to the U.S.

Issue:

Whether the leaf tobacco which is hand-stripped in a BC is substantially transformed into a "product of" the BC for purposes of the CBERA.

Law and Analysis:

Under the CBERA, eligible articles the growth, product, or manufacture of a BC, which are imported directly to the U.S. from a BC, qualify for duty-free treatment, provided the sum of (1) the cost or value of materials produced in a BC or two or more BC's, plus (2) the direct costs of processing operations performed in a BC or BC's is not less than 35 percent of the appraised value of the article at the time it is entered into the U.S. *See* 19 U.S.C. 2703(a)(1).

As stated in General Note 7, HTSUS, the Dominican Republic, Nicaragua, and Honduras are designated as BC's under the CBERA. In addition, it appears that the handstripped tobacco leaf is classifiable in subheading 2104.20, HTSUS, which is a CBERA eligible provision. Therefore, the tobacco will receive duty-free treatment if it is considered to be the "product of" a BC, the 35 percent value-content requirement is met, and the tobacco is "imported directly" into the U.S.

Under the Customs Regulations implementing the CBERA, an eligible article may be considered a "product of" a BC if it is either wholly the growth, product, or manufacture of

a beneficiary country, or a new or different article of commerce which has been grown, produced, or manufactured in the BC. *See* 19 CFR 10.195. Accordingly, where materials are imported into a BC from a non-BC, as in this case, those materials must be substantially transformed into a new and different article of commerce, a "product of" the BC. The cost or value of those materials may be included in calculating the 35 percent value content requirement only if they have undergone a "double substantial transformation" in the BC. *See* 19 CFR 10.196(a); *Azteca Milling Co. v. United States*, 703 F. Supp. 949 (CIT 1988), *aff'd*, 890 F.2d 1150 (Fed. Cir. 1989).

The test for determining whether a substantial transformation has occurred is whether an article emerges from a process with a new name, character or use, different from that possessed by the article prior to processing. *See Texas Instruments Inc. v. United States*, 69 CCPA 152, 156, 681 F.2d 778, 782 (1982).

In HRL 553120 dated September 28, 1984, we held that cigar leaf tobacco imported into the Dominican Republic and processed into cigar scrap tobacco qualified for duty-free treatment under the CBERA. In HRL 553120, some of the operations performed included: placing cigar leaf tobacco of Dominican and foreign origin in a vacudyne machine to add moisture to the tobacco leaves; blending tobacco of various grades; placing the tobacco leaves in sweat boxes for up to two weeks under high temperature and moisture to reduce the nicotine; mellowing the tobacco; creating certain chemical changes to reduce objectionable elements; cutting the tobacco leaves into particles; stemming the tobacco pieces; running the tobacco lamina of the tobacco particles off the stem and separating the lamina from the stem by means of air suction; running the tobacco pieces over vibrating screens to remove fine particles detrimental to cigar manufacture; and placing the tobacco pieces in drying chambers to reduce the moisture content from approximately 25 percent to 13 to 15 percent necessary for cigar manufacturing.

We held that the eleven steps involved in the production of the cigar scrap tobacco in HRL 553120 constituted a substantial transformation of the imported tobacco into a "product of" the Dominican Republic. In making this determination, we stated that the reduction of nicotine, mellowing of the tobacco, and chemical changes, supplemented with frequent quality control tests, various machines and other equipment used in the manufacturing process which required some degree of technical skill on the part of the Dominican workers, and the significant amount of time required for the entire production process, were substantial manufacturing operations which resulted in a substantial transformation of the imported tobacco into a "product of" the Dominican Republic. *See also* HRL 553825 dated February 4, 1986.

Upon reconsideration of your request for duty-free treatment under the CBERA, we are of the opinion that HRL 553120 was in error and should be revoked. With regard to the question of whether or not the processing of the tobacco in a beneficiary country results in a substantial transformation, we find relevant, *Uniroyal, Inc. v. United States*, 3 CIT 220, 542 F. Supp. 1026 (1982), a country of origin marking case involving imported shoe uppers. In this case, the court considered whether the addition of an outsole in the U.S. to imported uppers lasted in Indonesia effected a substantial transformation of the uppers. The court described the imported upper, which resembled a moccasin, and the process of attaching the outsole to the upper. The factors the court examined to determine whether a substantial transformation had taken place included: (a) a comparison of the time involved in attaching the outsole versus the time involved in manufacturing the upper, (b) a comparison of the cost involved in the process of attaching the outsole versus the cost involved in the process of manufacturing the upper, (c) a comparison of the cost of the imported upper versus the cost of the outsole, and (d) a comparison of the number of highly skilled operations involved in both processes The court concluded that a substantial transformation of the upper had not occurred since the attachment of the outsole to the upper is a minor manufacturing or combining process which leaves the identity of the upper intact. The upper was described as a substantially complete shoe and the manufacturing process taking place in the U.S. required only a small fraction of the time and cost involved in producing the upper.

Furthermore, in *Uniroyal*, the court examined the facts presented and determined that the completed upper was the very essence of the completed shoe. The concept of the "very essence" of a product was applied in *National Juice Products Association v. United States*, 10 CIT 48, 628 F. Supp. 978 (1986), where the court upheld a Customs determination that imported orange juice concentrate is not substantially transformed when it is domestically processed into retail orange juice products. In that case, the concentrate was mixed

with water, orange essences, orange oil and in some cases fresh juice and either packaged in cans and frozen or pasteurized, chilled and packed in liquid form. Customs found, and the court agreed, that the further processing of the juice did not produce an article with a new name, character or use because the essential character of the final product was imparted by the basic ingredient, the orange concentrate. The court stated that "the manufacturing concentrate 'imparts the essential character to the juice and makes it orange juice.' Thus, as in *Uniroyal*, the imported product is 'the very essence' of the retail product." The court further stated that "the retail product in this case is essentially the juice concentrate derived in substantial part from * * * oranges. The addition of water, orange essences and oils to the concentrate, while making it suitable for retail sale does not change the fundamental character of the product, it is still essentially the product of the juice or oranges."

We have also held in HRL 729365 dated June 25, 1986, that imported broccoli was not considered substantially transformed when it was further processed by cutting, blanching, packaging and freezing. The pre-processed broccoli was found to not lose its fundamental character and identity as a result of the processing operations that were performed. In addition, in HRL 731472 dated June 23, 1988, published as C.S.D. 88–19, Customs held that the peeling and deveining of shrimp did not change the name, character, or use of the shrimp, and, thus, did not constitute a substantial transformation. In that ruling, it was stated that the deveining and shelling operations did not significantly change the products' intended use, which is dictated primarily by the very nature of the product itself—raw shrimp. It was also noted that peeling and deveining operations often are performed by many consumers in their own kitchen. In addition, HRL 555684 dated January 18, 1991, Customs held that cheese is not substantially transformed when it undergoes processing from block cheese to grated cheese. In that ruling it was further stated that not only can grated cheese be created from raw cheese by consumers in their home, but, more importantly, the change of the cheese from raw to grated is only minor and does not change the fundamental character of the cheese. We view the hand-stripping and other operations performed on the tobacco as analogous to those operations described in the above-cases in which we held that a substantial transformation did not result.

We are of the opinion that, consistent with the above described cases, that leaf tobacco which is hand-stripped in a beneficiary country does not undergo a substantial transformation into a "product of" that beneficiary country. As in *Uniroyal* and *National Juice Products*, it is our determination that the very essence of the final product in the instant case is imparted by the tobacco, prior to any additional processes performed in the beneficiary country. The operations performed in the beneficiary country which include cleaning, conditioning the tobacco, handstripping, drying, etc., do not change the fundamental character or use of the tobacco in its exported condition. Before the tobacco undergoes the processing operations in the beneficiary country, it is already dedicated for use as tobacco leaf which can be either smoked or chewed. Although the fermentation process may condition the tobacco and change the nicotine content and color, this does not alter the essential character of the tobacco. It is tobacco which is exported to the beneficiary country and tobacco which is imported into the U.S. As in *Uniroyal*, we believe that the imported product is the very essence of the retail product. Thus, we view the operations performed in the beneficiary country as merely a finishing process which does not constitute a substantial transformation of the tobacco into a new and different article with a new name, character or use. Therefore, based on the foregoing analysis, we believe that HRL 553120 should be revoked.

Holding:

Based on the additional information submitted, we find that the leaf tobacco which is hand-stripped in a BC is not substantially transformed in a BC into a "product of" the BC. Therefore, the leaf tobacco will not qualify for duty-free treatment under the CBERA when imported into the U.S.

HRL 557192 is affirmed.

JOHN DURANT,
Director,
Commercial Rulings Division.

19 CFR Part 177

REVOCATION OF CUSTOMS RULING LETTER RELATING TO TARIFF CLASSIFICATION OF WOMEN'S LONG KNIT VESTS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of revocation of tariff classification ruling letter.

SUMMARY: Pursuant to section 625, Tariff Act of 1930 (19 U.S.C. 1625), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103–182, 107 Stat. 2057, 2186 (1993), this notice advises interested parties that Customs is revoking a ruling letter pertaining to the tariff classification of a women's long wool knit vest, style 12797. Notice of the proposed revocation was published February 16, 1994, in the CUSTOMS BULLETIN, Volume 28, Number 7.

EFFECTIVE DATE: This decision is effective for merchandise entered, or withdrawn from warehouse, for consumption on or after June 13, 1994.

FOR FURTHER INFORMATION CONTACT: Nancy Plumer, Textile Classification Branch, Office of Regulations and Rulings, (202) 482–7050.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On February 16, 1994, Customs published a notice in the CUSTOMS BULLETIN, Volume 28, Number 7, proposing to revoke District Ruling Letter (DD) 884908, issued April 23, 1993, by the District Director of Customs, Norfolk, VA, concerning the tariff classification of a women's knitted garment of 100% wool, style 12797, in subheading 6114.10.0040, Harmonized Tariff Schedule of the United States (HTSUS). No comments were received on the proposed revocation of DD 884908.

Pursuant to section 625, Tariff Act of 1930 (19 U.S.C. 1625), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103–182, 107 Stat. 2057, 2186 (1993) (hereinafter section 625), this notice advises interested parties that Customs is revoking DD 884908 to reflect proper classification of this garment in subheading 6110.10.2060, HTSUS, which provides for "[s]weaters, pullovers, sweatshirts, waistcoats (vests) and similar articles, knitted or crocheted: [o]f wool or fine animal hair: [o]ther: [v]ests, other than sweater vests: [w]omen's or girls'." The ruling revoking DD 884908 is set forth in Attachment A to this document.

Publication of rulings or decisions pursuant to section 625 does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

Dated: March 22, 1994.

JOHN DURANT,
Director,
Commercial Rulings Division.

[Attachment]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, D.C., March 22, 1994.

CLA–2 CO:R:C:T 955745 NLP
Category: Classification
Tariff No. 6110.10.2060

MR. ALAN SIEGAL
GENGHIS KHAN FREIGHT SERVICE
161–15 Rockaway Blvd.
Jamaica, New York 11434

Re: Partial revocation of DD 884908; women's long vest; heading 6110; HRLs 954713 and 954939.

DEAR MR. SIEGAL:

On April 29, 1993, Customs issued to you District Ruling Letter (DD) 884908, which classified various women's garments from Hong Kong under the Harmonized Tariff Schedule of the United States (HTSUS). Upon review, we are of the opinion that the classification of style 12797, a women's long vest, was incorrect and this ruling revokes that classification. Pursuant to section 625, Tariff Act of 1930 (19 U.S.C. 1625), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103–182, 107 Stat. 2057, 2186 (1993) (hereinafter section 625), notice of the proposed revocation of DD 884908 was published on February 16, 1994, in the CUSTOMS BULLETIN, Volume 28, Number 7.

Facts:

Style number 12797 is a woman's 100% wool knit sleeveless pullover vest. The garment has a deep U-shaped neckline in the front that runs straight across the top of the neck in the back. It has large armholes and tank-top shoulder straps that measure 2¾ inches wide. The vest extends from the wearer's neck and shoulders to approximately her knees. On each side of the vest there is a long slit that extends from the top of the hips to the bottom of the garment.

DD 884908 classified this garment in subheading 6114.10.0040, HTSUS, which provides for "[o]ther garments, knitted or crocheted: [o]f wool or fine animal hair: [t]ops: [w]omen's or girls'." The rate of duty is 17% *ad valorem* and the textile category code is 438.

Issue:

What is the tariff classification of style 12797 under the HTSUS?

Law and Analysis:

In Headquarters Ruling Letter (HRL) 954713, dated January 6, 1994, we dealt with the classification of garment style 12797. In this ruling letter, we stated the following:

> It is our position, based on our examination of the subject garment, style 12797, that it has the same basic features as the pullover vest classified in HRL 954939. Therefore,

based on our analysis as discussed in HRL 954939, this garment is considered to be a vest for tariff classification purposes and it is classifiable in subheading 6110.10.2060, HTSUS.

Thus, as the subject garment appears to be the same as the garment classified in HRL 954713, it is also classifiable in subheading 6110.10.2060, HTSUS, which provides for "[s]weaters, pullovers, sweatshirts, waistcoats (vests) and similar articles, knitted or crocheted: [o]f wool or fine animal hair: [o]ther: [v]ests, other than sweater vests: [w]omen's or girls'." Copies HRL 954713 and HRL 954939 are enclosed for your review.

Holding:

DD 884908 hereby is partially revoked.

Style 12797 is classifiable in subheading 6110.10.2060, HTSUS. The rate of duty is 17% *ad valorem* and the textile category code is 459.

The designated textile and apparel categories may be subdivided into parts. If so, the visa and quota requirements applicable to the subject merchandise may be affected. Since part categories are the result of international bilateral agreements which are subject to frequent renegotiations and changes, to obtain the most current information available we suggest the importer check, close to the time of shipment, the Status Report on current Import Quotas (Restraint Levels), an internal issuance of the U.S. Customs Service which is updated weekly and is available for inspection at your local Customs office.

Due to the changeable nature of the statistical annotation (the ninth and tenth digits of the classification) and the restraint (quota/visa) categories, you should contact your local Customs office prior to importation of this merchandise to determine the current status of any import restraints or requirements.

In accordance with section 625, this ruling will become effective 60 days from its publication in the CUSTOMS BULLETIN. Publication of rulings or decisions pursuant to section 625 does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

JOHN DURANT,
Director,
Commercial Rulings Division.

---

19 CFR Part 177

REVOCATION OF CUSTOMS RULING LETTERS RELATING TO TARIFF CLASSIFICATION OF "ONE SIZE FITS ALL" WOMEN'S GARMENTS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of revocation of tariff classification ruling letters.

SUMMARY: Pursuant to section 625, Tariff Act of 1930 (19 U.S.C. 1625), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103–182, 107 Stat. 2057, 2186 (1993), this notice advises interested parties that Customs is revoking three ruling letters pertaining to the tariff classification of "one size fits all" women's garments. Notice of the proposed revocation was published February 16, 1994, in the CUSTOMS BULLETIN, Volume 28, Number 7.

EFFECTIVE DATE: This decision is effective for merchandise entered, or withdrawn from warehouse, for consumption on or after June 13, 1994.

FOR FURTHER INFORMATION CONTACT: Josephine Baiamonte, Textile Classification Branch, Office of Regulations and Rulings, (202) 482–7050.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On February 16, 1994, Customs published a notice in the CUSTOMS BULLETIN, Volume 28, Number 7, proposing to revoke District Ruling Letter (DD) 866919, issued September 23, 1991, DD 840465, issued May 15, 1989, and New York Ruling Letter (NY) 835096, issued January 10, 1989, concerning the tariff classification of "one size fits all" women's garments constructed of 100 percent cotton woven fabric. DD 866919 and DD 840465 classified the garment in subheading 6211.42.0050, Harmonized Tariff Schedule of the United States Annotated (HTSUSA), and NY 835096 classified the garment in 6206.30.3010, HTSUSA. No comments were received on the proposed revocation of these rulings.

Pursuant to section 625, Tariff Act of 1930 (19 U.S.C. 1625), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103–182, 107 Stat. 2057, 2186 (1993) (hereinafter section 625), this notice advises interested parties that Customs is revoking DD 866919, DD 840465, and NY 835096 to reflect proper classification of these garments. Accordingly, the garments (if DD 866419 and DD 840465 are classified in subheading 6204.42.3050, HTSUSA, which provides for, in pertinent part, dresses: of cotton: other: women's. NY 835096 is classifiable in subheading 6204.42.3030, HTSUSA, which provides for, among other things, dresses: of cotton: with two or more colors in the warp and/or filling: women's. The ruling revoking DD 866919, DD 840465 and NY 835096 is set forth in Attachment A to this document.

Publication of rulings or decisions pursuant to section 625 does not constitute a change of practice or position in accordance with section 177.10 (c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

Dated: March 25, 1994.

JOHN DURANT,
Director,
Commercial Rulings Division.

[Attachment]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, D.C., March 25, 1994.

CLA–2 CO:R:C:T 954703 jb
Category: Classification
Tariff No. 6204.42.3030 and 6204.42.3050

MRS. NALINI PATEL
P.A.C. IMPORTS INC.
18 West 30th Street
New York, NY 10001

Re: Revocation of DD 866919, DD 840465 and NY 835096; women's garments at issue are dresses, not big shirts; *Textile Category Guidelines*, 13/88.

DEAR MRS. PATEL:

On separate occasions Customs issued you the following rulings concerning the classification of women's "one size fits all" garments constructed of 100 percent cotton woven fabric: District Ruling Letter (DD) 866919, dated September 23, 1991, DD 840465, dated May 15, 1989, and New York Ruling Letter (NY) 835096, dated January 10, 1989. Upon review, we are of the opinion that the classification of these garments was incorrect and therefore this ruling revokes those classification determinations. Pursuant to section 625, Tariff Act of 1930 (19 U.S.C. 1625), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103–182, 107 Stat. 2057, 2186 (1993) (hereinafter section 625), notice of the proposed revocation of DD 866919, DD 840465 and NY 835096 was published on February 16, 1994, in the CUSTOMS BULLETIN, Volume 28, Number 7.

Facts:

The garments consist of style number 3723 (addressed in NY 835096), style number 4978/2492 (addressed in DD 866919) and style number 4328/2055 (addressed in DD 840465) All of the garments are manufactured from 100 percent woven cotton fabric. Aside from minor stylistic differences, all of the garments share the following characteristics: they extend approximately five inches below the knee and feature "one size fits all" sizing, a full front opening secured by buttons, breast patch pockets, short sleeves and deep tailed bottom, the highest point of which extends approximately tour inches below mid-thigh.

Style number 3723 is manufactured from yarn dyed fabrics with two or more colors in the warp and/or filling and has a nine button closure, two breast pockets with flaps and a pointed collar. Style number 4978/2492 is manufactured from printed fabric and has an eight button closure, a notched collar, a left breast pocket and a right side-seamed pocket below the waist. Style number 4328/2055 has a V-neckline, a three button closure, a left breast pocket and a right side-seamed pocket.

Issue:

Whether the garments are classifiable as dresses or as over-sized shirts?

Law and Analysis:

Classification of merchandise under the HTSUSA is in accordance with the General Rules of Interpretation (GRI), taken in order. GRI I requires that classification be determined according to the terms of the headings and any relative section or chapter notes, taken in order. Where goods cannot be classified solely on the basis of GRI 1, the remaining, GRI will be applied, in the order of their appearance.

In HQ 952903, dated February 17, 1993, we issued you a determination on nearly identical merchandise classifying the ladies' garments as dresses under heading 6204, HTSUSA. In that ruling we stated:

> Upon examination of the subject garments, it is this office's opinion that the styling, length and coverage provided by these garments render them suitable for use as dresses. Although the styling of these garments is evocative of a shirt, this does not preclude their classification as dresses inasmuch as this type of dress style is recognized in the industry. The *Textile Category Guidelines*, CIE, 13/88, expressly provide for "woven garments styled like shirts or blouses which extend below mid-thigh may

be included in this category if they are designed and/or intended for wear as dresses and provide the coverage dresses require * * * [T]his category also includes garments * * * of various lengths frequently sold in loungewear departments." As these types of garments are expressly provided for in the *Guidelines* as dresses, we do not agree with your assertion that they do not meet the dress requirements * * *

The garments extend to approximately five inches below the knee and each features a deep tailed bottom hem which reaches to approximately four inches below mid-thigh at its highest point. These features provide the garments with sufficient coverage to render them suitable for wear outside the home. Additionally, in our opinion, these garments are too long to be worn as over-sized shirts. It would be impractical to wear these garments either tucked in or over another garment. In a situation where the garment were tucked in, the length of the garment would result in evident bulging in either pants or a skirt. Alternatively, to wear the shirt over another garment, such as a skirt, would result in very little of the skirt being visible. Even in a situation where the garments were worn with tights and hosiery articles, it would not detract from the principal identity of the garments as dresses.

Holding:

NY 835096, addressing style number 3723, is revoked.
DD 866919, addressing style number 4978/2492, is revoked.
DV 840465, addressing style number 4328/2055, is revoked.
The garments at issue are classifiable as follows:

Style number 3723 is classifiable in subheading 62()4.42.3030, HTSUSA, which provides for, among other things, dresses: of cotton: with two or more colors in the warp and/or filling: women's. The applicable rate of duty is 12.6 percent *ad valorem* and the textile quota category is 336.

Style numbers 4978/2492 and 4328/2055 are classifiable in subheading 6204.42.3050, HTSUSA, which provides for, in pertinent part, dresses: of cotton: other: women's. The applicable rate of duty is 12.6 percent *ad valorem* and the textile quota category is 336.

The designated textile and apparel category may be subdivided into parts. If so, visa and quota requirements applicable to the subject merchandise may be affected. Since part categories are the result of international bilateral agreements which are subject to frequent negotiations and changes, we suggest that you check, close to the time of shipment, the *Status Report on Current Import Quotas (Restraint Levels),* an issuance of the U.S. Customs Service which is updated weekly and is available at the local Customs office.

Due to the changeable nature of the statistical annotation (the ninth and tenth digits of the classification) categories, you should contact the local Customs office prior to importing the merchandise to determine the current status of any import restraints or requirements.

In accordance with section 625, this ruling will become effective 60 days from its publication in the CUSTOMS BULLETIN. Publication of rulings or decisions pursuant to section 625 does not constitute a change of practice or position in accordance with section 177.10(c) (1), Customs Regulations (19 CFR 177.10(c)(1).

JOHN DURANT,
Director,
Commercial Rulings Division.

19 CFR Part 177

REVOCATION OF CUSTOMS RULING LETTER RELATING TO TARIFF CLASSIFICATION OF WARP-KNIT RIBBON WITH INSERTED METALIZED STRIPS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of revocation of tariff classification ruling letter.

SUMMARY: Pursuant to section 625, Tariff Act of 1930 (19 U.S.C. 1625), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103–182, 107 Stat. 2057, 2186 (1993), this notice advises interested parties that Customs is revoking a ruling letter pertaining to the tariff classification of a warp-knit ribbon. Notice of the proposed revocation was published February 16, 1994, in the CUSTOMS BULLETIN, Volume 28, Number 7.

EFFECTIVE DATE: This decision is effective for merchandise entered, or withdrawn from warehouse, for consumption on or after June 13, 1994.

FOR FURTHER INFORMATION CONTACT: Nancy Plumer, Textile Classification Branch, Office of Regulations and Rulings, (202) 482–7050.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On February 16, 1994, Customs published a notice in the CUSTOMS BULLETIN, Volume 28, Number 7, proposing to revoke New York Ruling Letter 874310, issued on May 18, 1992, by the Area Director of Customs, New York Seaport, concerning the tariff classification of a warp-knit ribbon with inserted metalized strips in subheading 6002.20.9000, Harmonized Tariff Schedule of the United States (HTSUS). No comments were received on the proposed revocation of NYRL 874310.

Pursuant to section 625, Tariff Act of 1930 (19 U.S.C. 1625), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103–182, 107 Stat. 2057, 2186 (1993) (hereinafter section 625), this notice advises interested parties that Customs is revoking NYRL 874310 to reflect proper classification of the warp-knit ribbon in subheading 4601.99.0000, HTSUS, which provides for "[p]laits and similar products of plaiting materials, whether or not assembled into strips; plaiting materials, plaits and similar products of plaiting materials, bound together in parallel strands or woven, in sheet form, whether or not being finished articles (for example, mats, matting, screens): [o]ther: [o]ther." The ruling revoking NYRL 874310 is set forth in Attachment A to this document.

Publication of rulings or decisions pursuant to section 625 does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

Dated: March 22, 1994.

JOHN DURANT,
Director,
Commercial Rulings Division.

[Attachment]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, D.C., March 22, 1994.

CLA-2 CO:R:C:T 954628 NLP
Category: Classification
Tariff No. 4601.99.0000

MR. JAMES SPANGLER
IMPORT MANAGER
H.T. ARDINGER & SON CO.
P.O. Box 569360
Dallas, Texas 75356-9360

Re: Revocation of NYRL 874310; warp-knit ribbon with inserted metalized strips; headings 4601 and 6002; Legal Notes 1 and 3 to Chapter 46; Explanatory Notes to Chapters 46 and 609.

DEAR MR. SPANGLER:

On May 18, 1992, Customs issued to you New York Ruling Letter (NYRL) 874310, which classified a warp-knit ribbon with inserted metalized strips under subheading 6002.20.9000, Harmonized Tariff Schedule of the Unites States (HTSUS). Upon review, we are of the opinion that the classification of this product was incorrect and this ruling revokes that classification. Pursuant to section 625, Tariff Act of 1930 (19 U.S.C. 1625), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103-182, 107 Stat. 2057, 2186 (1993) (hereinafter section 625), notice of the proposed revocation of NYRL 874310 was published on February 16, 1994, in the CUSTOMS BULLETIN, Volume 28, Number 7.

Facts:

The article at issue, sample R-129, is a decorative ribbon-type material measuring 5.3 centimeters in width. The fiber content of the ribbon is 80% polyester and 20% polypropylene, which will be sold in 10 foot rolls. The material is of warp-knit construction, in which the knitting machine has formed six parallel tracks of tightly knitted stitches running the length of the material. Between these six tracks are five parallel areas of open-work knitting, resembling ties between railroad tracks.

Inserted into these five open-work areas, apparently during the knitting process, are five metalized extruded strips. We assume that these strips are of polyester, coated with a fine metal film. Two of these extruded strips are 5 millimeters wide and three of them are 11 millimeters wide; they run the length of the material and completely fill the open-work spaces between the six tracks.

All of the stitching on the face of the material was done with metalized yarn, while the stitching on the back of the material was done with plain monofilament. The metalized and monofilament yarns wrap around metal wires along each of the two fast edges of the material.

NYRL 874310 classified this ribbon in subheading 6002.20.9000, HTSUS, which provides for "[o]ther knitted or crocheted fabrics: [o]ther, of a width not exceeding 30 cm: [o]ther: [o]ther." The rate of duty is 7.5% *ad valorem* and the textile category code is 899.

We submitted the ribbon to the New York Customs Laboratory for analysis. The lab found that the ribbon has the following composition, by weight, exclusive of metal wire:

> Textile: 75.2% (metallic yarn, monofilament and strips under 5 mm in width)
> Strips over 5 mm in width: 24.8

Issue:

What is the tariff classification of a warp-knit ribbon with inserted metalized strips under the HTSUS?

Law and Analysis:

The classification of goods under the HTSUS is governed by the General Rules of Interpretation (GRIs), taken in order. GRI 1 provides that classification shall be determined according to the terms of the headings and any relative section or chapter notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes otherwise require, the remaining GRI's may be applied, taken in order.

There are two competing HTSUS headings under which this ribbon is potentially classifiable. The first heading we will consider is heading 4601, HTSUS, which provides for "[p]laits and similar products of plaiting materials, whether or not assembled into strips; plaiting materials, plaits and similar products of plaiting materials, bound together in parallel strands or woven, in sheet form, whether or not being finished articles (for example, mats, matting, screens)". Legal Note 1 to Chapter 46, HTSUS, states the following:

> In this chapter the expression *"plaiting materials"* means materials in a state or form suitable for plaiting, interlacing or similar processes; it includes * * * monofilament and strip and the like of plastics * * *, but not * * * monofilament and strip and the like of chapter 54.

In addition, Legal Note 3 to Chapter 46, HTSUS, states the following: "For the purposes of heading 4601, the expression *'plaiting materials, plaits and similar product, of plaiting materials, bound together in parallel strands'* means plaiting materials, plaits and similar products of plaiting materials, placed side by side and bound together, in the form of sheets, whether or not the binding materials are of spun textile materials."

The Harmonized Commodity Description and Coding System Explanatory Notes (ENs), although not legally binding, are the official interpretation of the nomenclature at the international level. The General EN to Chapter 46 states the following on page 651:

> In addition to articles of loofah, this Chapter covers semi-manufactured products (heading 46.01) and certain articles (46.01 and 46.02) made by interlacing, weaving or by similar methods of assembling unspun materials, particularly:
>
> * * * * * * *
>
> (3) Monofilament and strip and the like of plastics of Chapter 39 (but *not* monofilament of which no cross-sectional dimension exceeds 1 mm *nor* strip or the like of an apparent width not exceeding 5 mm, of man-made textile materials, of *Chapter 54).*

Moreover, the ENs to heading 4601 state, in pertinent part, on page 653, that goods made by binding parallel strands of plaiting materials may be bound by plaiting material, textile yarn or some other material.

Legal Note 1 to Chapter 46, HTSUS, when read in conjunction with the General EN to Chapter 46 cited above makes it clear that Chapter 46 encompasses strips of plastics with apparent widths above 5 mm, suitable for plaiting and interlacing. The ribbon at issue here is described by the above notes. It is made of plaiting material consisting of the metalized plastic strips over 5 millimeters in width and they are bound together in parallel strands, in the form of sheets, using a monofilament.

The second possible heading to consider is heading 6002, HTSUS, which provides for "[o]ther knitted or crocheted fabrics". While the subject ribbon has clearly been manufactured on a knitting machine, the question is whether this fabric meets the definition of "other knitted or crocheted fabrics" as intended under heading 6002, HTSUS.

The ENs to Chapter 60, page 826, state that "[t]he headings of this Chapter cover knitted or crocheted fabrics, *regardless of which of the textiles of Section XI* are used to make the goods * * *" The fabric in question is a warp-knit fabric and subheading 6002.43.0000, HTSUS, provides for warp knit fabrics of man-made fibers. In addition, the filament yarn, which is one of the components of this fabric, is provided for under either

heading 5402 or 5404 and is therefore a textile component. The strips not exceeding 5 mm in width would be classified under heading 5404, HTSUS, if imported separately, and would also be considered a textile component. The only components that could be in question are the 11 millimeter strips. *See,* Legal Note 1(g) to Section XI.

Moreover, General Explanatory Note (A)(II) to Chapter 60, page 825, states that "[w]arp knits consist of a number of threads running in the direction of the warp (i.e., along the length of the fabric) each thread forming loops interlocking alternatively with loops in rows to left and right." This also describes the ribbon at hand. Thus, because the fabric is made on a knitting machine and some of the component materials (the monofilament and the 5 millimeter strips) are textiles, the fabric could be classified under heading 6002 as other knitted fabric.

The ribbon in question is a good consisting partly of plaiting material and partly of knitted textile material. Therefore, it is *prima facie* classifiable under heading 4601, HTSUS, and heading 6002, HTSUS, respectively. GRI 2(b) states that:

> (b) * * * Any reference to goods of a given material or substance shall be taken to include a reference to goods consisting wholly or partly of such material or substance. The classification of goods consisting of more than one material or substance shall be according to the principles of rule 3.

As the ribbon consists of more than one material, the principles set forth in GRI 3 are to be utilized to render a final classification determination.

GRI 3(a) states the following:

> When, by application of rule 2(b) or for any other reason, goods are, *prima facie,* classifiable under two or more headings, classification shall be effected as follows:
>
> (a) The heading which provides the most specific description shall be preferred to headings providing a more general description. However, when two or more headings each refer to part only of the materials or substances contained in mixed or composite goods * * *, those headings are to be regarded as equally specific in relation to the goods, even if one of them gives a more complete or precise description of the goods.

In heading 6002, HTSUS, the term "knitted fabrics", since it names a particular type of construction and a particular type of article would appear to provide a specific description. Similarly, under heading 4601, HTSUS, the term "plaiting materials * * * bound together in parallel strands" describes both a type of construction and a type of article and is a specific description of this product. Therefore, as both headings specifically describe the type of construction (knitted or bound together) and the type of article (fabric or material) they are equally specific in describing this ribbon. Therefore, we cannot resort to GRI 3(a) in classifying this ribbon. We look to GRI 3(b), which provides the following:

> (b) Mixtures, composite goods consisting of different materials or made up of different components, and goods put up in sets for retail sale, which cannot be classified by reference to 3(a), shall be classified as if they consisted of the material or component which gives them their essential character, insofar as this criterion is applicable.

Regarding "essential character", EN VIII to GRI 3(b), page 4, states that:

> (VIII) The factor which determines essential character will vary as between different kinds of goods. It may, for example, be determined by the nature of the material or component, its bulk, quantity, weight or value, or by the role of a constituent material in relation to the use of the goods.

In making the essential character determination, we can ignore the textile filaments and metalized yarns as they can be considered *either* part of the plaiting (since they serve to bind the plaiting substance as per the EN to Chapter 46) or part of the knitted fabric. The three wide strips constitute 33 millimeters in total width, while the two 5 millimeter strips constitute 10 millimeters in total width. Since the ribbon is primarily decorative in use, its appearance is the primary factor in determining its essential character. The dominant visual impression is provided by the wide strips, since they constitute significantly more of the surface area of the ribbon than do the narrower strips. Therefore, the plaiting material provides the essential character and this ribbon is classifiable under subheading 4601.99.0000, HTSUS.

Holding:

The ribbon is classifiable under subheading 4601.99.0000, HTSUS, which provides for "[p]laits and similar products of plaiting materials, whether or not assembled into strips; plaiting materials, plaits and similar products of plaiting materials, bound together in par-

allel strands or woven, in sheet form, whether or not being finished articles (for example, mats, matting, screens): [o]ther: [o]ther. The rate of duty is 3.36% *ad valorem*.

NYRL 874310 hereby is revoked.

In accordance with section 625, this ruling will become effective 60 days from its publication in the CUSTOMS BULLETIN. Publication of rulings or decisions pursuant to section 625 does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

JOHN DURANT,
Director,
Commercial Rulings Division.

REVOCATION OF CUSTOMS RULING LETTER RELATING TO TARIFF CLASSIFICATION OF A HAND-CAST, STRING-DRAWN FISHING NET

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of revocation of tariff classification ruling letter.

SUMMARY: Pursuant to section 625, Tariff Act of 1930 (19 U.S.C. § 1625), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103–182, 107 Stat. 2057, 2186 (1993), this notice advises interested parties that Customs is revoking a ruling pertaining to the tariff classification of a hand-cast, string-drawn fishing net. Notice of the proposed revocation was published on February 16,1994, in the CUSTOMS BULLETIN, Volume 28, Number 7.

EFFECTIVE DATE: This decision is effective for merchandise entered, or withdrawn from warehouse, for consumption on or after June 13, 1994.

FOR FURTHER INFORMATION CONTACT: Howard G. Plofker, Esq., Textile Classification Branch, Office of Regulations & Rulings, at (202) 482–7050.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On February 16, 1994, Customs published a notice in the CUSTOMS BULLETIN, Volume 28, Number 7, proposing to revoke a ruling pertaining to the tariff classification of a hand-cast, string-drawn fishing net. In Headquarters Ruling Letter 087173 of September 18, 1990, by the Director, Commercial Rulings Division, a hand-cast, string-drawn fishing net was classified under subheading 9507.90.6000, Harmonized Tariff Schedule of the United States Annotated (HTSUSA). 46 comments were received. Pursuant to section 625, Tariff Act of 1930 (19 U.S.C. § 1625), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementa-

tion Act, Pub. L. 103–182, 107 Stat. 2057, 2186 (1993) (hereinafter section 625), this notice advises interested parties that Customs is revoking HRL 087173 to reflect proper classification of the product in subheading 5608.11.0010, HTSUSA, which provides for made up fishing nets and other made up nets, of textile materials. Our response to the comments received is reflected in the ruling revoking Headquarters Ruling Letter 087173 which is set forth in Attachment A to this document.

Publication of rulings or decisions pursuant to section 625 does not constitute a change of practice or position in accordance with section 177.10(c) (Customs Regulations (19 C.F.R. § 177.10(c)(1)).

Dated: March 28, 1994.

JOHN DURANT,
Director,
Commercial Rulings Division.

[Attachment]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, D.C., March 28, 1994.

CLA–2 CO:R:C:T 951480 HP
Category: Classification
Tariff No. 5608.11.0010

MR. SALVATORE CARAMAGNO
ROSS & HARDIES
888 16th Street, N.W.
Washington, D.C. 20006–4103

Re: Notification of revocation of HRL 087173 by HRL 950561.

DEAR MR. CARAMAGNO:

This is further to your letter of May 8, 1990. That letter concerned the tariff classification, under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA), of fishing nets, produced in Taiwan. Please reference your client Blue Ribbon Products.

Facts:

The merchandise at issue consists of a net, approximately six feet in diameter, with a ½" mesh size, and weighted with lead. It is made of an open mesh construction with knotted monofilament yarn of man–made fiber. The subject net is commonly known as a cast net, used to catch bait such as minnows.

In HRL 087173, we classified this net under subheading 9507.90.6000, HTSUSA, as a net similar to fish landing nets and sports nets. This subheading was preferred over heading 5608, HTSUSA, which provides for, *inter alia,* made up fishing nets and other made up nets. Pursuant to section 625, Tariff Act of 1930 (19 U.S.C. § 1625), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103–182, 107 Stat. 2057, 2186 (1993) *(hereinafter* section 625), notice of the proposed revocation of HRL 087173 was published on February 16, 1994, in the CUSTOMS BULLETIN, Volume 28, Number 7.

Issue:

Whether the classification under the HTSUSA of the cast nets as similar to sports nets was correct?

Law and Analysis:

Heading 5608, HTSUSA, provides for, *inter alia,* made up fishing nets and other made up nets, of textile materials. The Explanatory Notes (EN) to the HTSUSA constitute the official interpretation of the tariff at the international level. While not legally binding, they do represent the considered views of classification experts of the Harmonized System Committee. It has therefore been the practice of the Customs Service to follow, whenever possible, the terms of the Explanatory Notes when interpreting the HTSUSA. The EN to this heading provides:

> (2) Made up fishing nets and other made up nets, of textile materials.
>
> * * * * * * *
>
> Made up nets are nets, whether or not ready for use, made directly to shape or assembled from pieces of netting. The presence of handles, rings, weights, floats, cords or other accessories does not affect the classification of the goods of this group.
>
> Made up nets of this heading are restricted to those nets not covered more specifically by other headings of the Nomenclature. The heading includes fishing nets * * *.
>
> The heading does not cover:
>
> * * * * * * *
>
> (c) Sports nets (e.g., goal nets and tennis nets), fish landing nets and other nets of Chapter 95.

Heading 9507, HTSUSA, provides for, *inter alia,* fish landing nets, butterfly nets and similar nets. The EN to this heading describes these nets as "usually consist[ing] of pocket-like nets of textile yarn or cord, mounted on a wire support and fixed to a handle." Therefore, if we consider a net to be similar to the fish landing nets, classification in heading 9507 would be mandated.

In HRL 087173, we held that the cast nets were excluded from heading 5608, HTSUSA, and were properly classified in heading 9507, HTSUSA. The ruling went on to state:

> You [the importer] have suggested that the cast net at issue is excluded from heading 5608 because it is used by sports fishermen to catch bait and thus, should be considered a sports net. We agree that cast nets are principally used in the United States by sports fishermen to catch bait. Furthermore, you contend that the fishing nets encompassed by heading 5608 are limited to commercial fishing nets and that the cast net at issue is excluded since its principle use is not commercial, but recreational.

In our response to a Request for Internal Advice by the Area Director, Newark, on the tariff classification of crab nets (HRL 950561 of this date), we stated:

> HRL 087173 based the cast net's exclusion from heading 5608, HTSUSA, on two basic points. First, in stating that the nets are "principally used by sports fishermen," HRL 087173 reasoned that the nets should "fall within the [Explanatory Note] exclusion for sports nets." Heading 9506, HTSUSA, provides for articles and equipment for sports. These sports include skiing, golfing, ping-pong, tennis, badminton, baseball, polo, ice skating, football, *etc.* Badminton nets are the only nets provided for *eo nomine.* It is clear that nets for these sports in no way resemble, and are therefore not similar to, cast nets. Additionally, the National Import Specialists for both sports equipment and nets agree that the Explanatory Note exclusion for "sports nets" is separate and distinct from the exclusion for "fish landing nets and similar nets." HRL 087173's merging of the two into an exclusion for "sports nets similar to fish landing nets" was therefore incorrect.
>
> The cast nets do not qualify for the exclusion as fish landing nets. Heading 9507 provides for fish landing nets. The Explanatory Note to heading 9507 describes them as "usually consist[ing] of pocket-like nets * * * mounted on a wire support and fixed to a handle." THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE (unabridged) defines a landing net as "a small, bag-shaped net with a handle at the mouth, for scooping a hooked fish out of the water and bringing it to shore or into a boat." The cast net clearly does not resemble the landing net in design, construction, or use. It is cast out upon the waters and drawn back to the fisherman, hopefully full of minnows. Except for the size of the fish and the size of the mesh, this is essentially how a net is used by a commercial fisherman.
>
> In *Pier I Imports, Inc. v. United States,* 83 Cust. Ct. 43, C.D. 4819 (Aug. 24, 1979) (TSUS), the U.S. Customs Court established the common and commercial meaning of fishnets as nets for **catching fish,** as opposed to material **resembling** fishing nets.

See WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE, UNABRIDGED (1966) (containing the definition the Court adopted). Therefore, "only commercial fishing nets and fish netting were encompassed in the * * * provisions [for fishing nets]," and "netting which is not suitable for commercial fishing" *(i.e.*, decorative fish netting for hanging on walls) are classified in the provisions for other nets.

In light of this language, HRL 087173's second point was 9) that only nets principally used for **commercial** fishing were classifiable as "made up fishing nets." This conclusion demonstrates a misreading of the *Pier I Imports* decision. In stating that "only commercial fishing nets and fish netting [(as opposed to netting for decorative display, which was the merchandise at issue)] were encompassed in the * * * provisions [for fishing nets]," the Court was distinguishing between the nets' capability to catch fish, not creating an tariff-based distinction between commercial and, recreational fishing. Indeed, the Court repeatedly stated that the merchandise "was not sufficiently durable for use in catching fish." *See* HRL 060802, C.S.D. 80–224, 14 Cust. B. & Dec. 1128 (Feb. 8, 1980) (following *Pier I Imports* in holding that an aquarium net, irrespective of its user, is a net "not suitable for commercial fishing"). HRL 087173's extension of *Pier I Imports*' "suitable for commercial fishing" to "principally used" by commercial fishermen was incorrect; accordingly, HRL 087173 is hereby revoked.

A copy of this ruling may be requested by following procedures outlined in the Freedom of Information Act, 5 U.S.C. § 552.

Uniform and Established Practice:

You have argued that "an established and uniform practice has developed with respect to these fish nets pursuant to the issuance of HRL 087173 *[sic.]*. Section 177.10(c)(1) of the CUSTOMS REGULATIONS, states that:

> Before the publication of a ruling which has the effect of changing a practice and which results in the assessment of a higher rate of duty, notice that the practice (or prior ruling on which the practice is based) is under review will be published in the *Federal Register* and interested parties will be given an opportunity to make written submissions with respect to the correctness of the contemplated change.

See also Section 315(d), Tariff Act of 1930, as amended. Established practice must be shown by positive evidence. Sturm, *A Manual of Customs Law* (1974), at 201. It is not established by the rulings of one or two collectors [ports] as to a few shipments * * *." *Id.*, citing, *inter alia*, *United States v. H. Reeve Angel Co., Inc.*, 33 CCPA 114, C.A.D.324 (1946), *cert. den.* 328 U.S. 835 (1946).

In your letter of July 23, 1993, you submitted lists of three companies' entries of cast nets. You stated that these 80 liquidations occurred from approximately February of 1991 through the present. You argue that these liquidations are evidence of an established and uniform practice by the Customs Service of classifying cast nets within heading 9507, HTSUSA. For the following reasons. we disagree.

- Prior to the issuance of HRL 087173, cast nets such as these were consistently classified either as articles of lead (via chief value) or as fishing nets of textiles. *See, e.g.*, HRL 045042 of April 2, 1976.
- NYRL 832770 of November 1, 1988, and NYRL 833536 of December 9, 1988, classified cast nets under heading 5608, HTSUSA, as nets of textile materials.
- On October 1, 1992, the National Import Specialist (NIS) for this type of merchandise surveyed Customs field personnel with respect to classification of this merchandise in fiscal years 1991 and 1992. Six ports have been entering cast nets: 2 under heading 9507, 3 under heading 5608, and 1 under both headings.
- On August 20, 1993, the NIS performed a computer search of entries from January, 1992 to July, 1993. Nine different importers entered cast nets under heading 5608, HTSUSA, one of which is a company you submitted evidence for in your July 23, 1993, letter, *supra*.

Judging from the above, it is apparent that the cast nets have not been classified in accordance with an established and uniform practice of classification, but rather have been subject to disparate Customs treatment under the HTSUSA. Your claim that the aforementioned list of liquidations constitutes evidence of a practice therefore is appropriately denied.

Holding:

As a result of the foregoing, the merchandise at issue is classified under subheading 5608.11.0010, HTSUSA, as knotted netting of twine, cordage or rope; made up fishing nets and other made up nets, of textile materials, of man-made textile materials, made up fishing nets, hand-cast, string-drawn. The applicable rate of duty is 17 percent *ad valorem*.

This letter should be considered a notice of revocation of HRL 087173 of September 18, 1990, by HRL 950561. In accordance with section 625, this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN. Publication of rulings or decisions pursuant to section 625 does not constitute a change of practice or position in accordance with section 177. 10(c)(1), CUSTOMS REGULATIONS (19 C.F.R. 177. § 10(c)(1).

A copy of this ruling letter should be attached to the entry documents filed at the time this merchandise is imported. If the documents have been filed without a copy, this ruling should be brought to the attention of the Customs officer handling the transaction.

JOHN DURANT,
Director,
Commercial Rulings Division.

---

19 CFR Part 177

REVOCATION OF CUSTOMS RULING LETTER RELATING TO TARIFF CLASSIFICATION OF FLUX

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of revocation of tariff classification ruling letter.

SUMMARY: Pursuant to section 625, Tariff Act of 1930 (19 U.S.C. 1625), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103–182, 107 Stat. 2057, 2186 (1993), this notice advises interested parties that Customs is revoking a ruling pertaining to the tariff classification of a flux product which is used to facilitate the soldering, brazing or welding processes used to join metal surfaces. Notice of the proposed revocation was published February 16, 1994, in the CUSTOMS BULLETIN, Volume 28, Number 7.

EFFECTIVE DATE: This decision is effective for merchandise entered, or withdrawn from warehouse, for consumption on or after June 13, 1994.

FOR FURTHER INFORMATION CONTACT: Ann Segura Minardi, Food and Chemicals Classification Branch, Office of Regulations and Rulings (202) 482–7020.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On February 16, 1994, Customs published a notice in the CUSTOMS BULLETIN, Volume 28, Number 7, proposing to revoke New York Ruling

Letter (NYRL) 888580, issued August 6, 1993, by the Area Director of Customs, New York Seaport, concerning the tariff classification of "Nocolok" Flux from Germany. No comments were received.

Pursuant to section 625, Tariff Act of 1930 (19 U.S.C. 1625), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103–182, 107 Stat. 2057, 2186 (1993), (hereinafter section 625), this notice advises interested parties that Customs is revoking NYRL 888580 to reflect the proper classification of this product, "Nocolok" Flux, in subheading 3810.90.2000, Harmonized Tariff Schedule of the United States Annotated (HTSUSA), the provision for "* * * fluxes and other auxiliary preparations for soldering, brazing, or welding * * *: Other: Consisting wholly of inorganic substances."

Publication of rulings or decisions pursuant to section 625 does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

Dated: March 29, 1994.

JOHN DURANT,
Director,
Commercial Rulings Division.

[Attachment]

[ATTACHMENT]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, D.C., March 29, 1994.
CLA–2 CO:R:C:F 954959 ASM
Category: Classification
Tariff No. 3810.90.2000

MR. MICHAEL F. MITRI
PHELAN & MITRI
1177 Summer Street
Stamford, CT 06905

Re: Reconsideration and Revocation of New York Ruling Letter 888580 concerning the tariff classification of "Nocolok" Flux from Germany.

DEAR MR. MITRI:

In New York Ruling Letter (NYRL) 888580, issued August 6, 1993, "Nocolok" Flux imported from Germany was classified under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA). We have reviewed that ruling and have found it to be in error. The correct classification is as follows. Pursuant to section 625, Tariff Act of 1930 (19 U.S.C. 1625), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103–182, 107 Stat. 2057, 2186 (1993) (hereinafter section 625), notice of the proposed revocation of NYRL 888580, was published on February 16, 1994, in the CUSTOMS BULLETIN, Volume 28, Number 6.

Facts:

In NYRL 888580, the subject product, "Nocolok" Flux, was classified in subheading 3810.10.0000, Harmonized Tariff Schedule of the United States Annotated (HTSUSA),

which provides, in part, for pickling preparations and pastes consisting of metal and other materials. We have reviewed that ruling and have found it to be in error. The correct classification follows.

According to your submission, the intended use of "Nocolok" Flux is as a coating for metal parts to remove the oxide layer from the surfaces thereby permitting the metal surfaces to be joined. It is your contention that fluxes in any form which are designed to facilitate soldering, brazing or welding processes, including "Nocolok" Flux, are classifiable under HTSUSA subheading 3810.90.2000.

The technical literature submitted includes two studies under the *SAE Technical Paper Series* identifying the product as a "flux" in powder form consisting of a "eutectic" mixture of $KAlF_4$ and K_3AlF_6. The Condensed Chemical Dictionary indicates that a "flux" is used to prevent the formation of oxides, and a "eutectic" mixture is an alloy. According to the product description, there is no metal filler in the product; it is a pure flux. Furthermore, because it is eutectic, "Nocolok" melts at a temperature very close to the melting point of aluminum. Thus, "Nocolok" facilitates the joining of two metal surfaces by preventing the formation of oxides in the welding, brazing, or soldering process of aluminum.

Issue:

Whether the product, "Nocolok" Flux, should be classified under HTSUSA subheading 3810.90.2000.

Law and Analysis:

Classification under the HTSUSA is made in accordance with the General Rules of Interpretation (GRI's). The systematic detail of the harmonized system is such that virtually all goods are classified by application of GRI 1, that is, according to the terms of the headings of the tariff schedule and any relative section or chapter notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not other vise require, the remaining GRI's may then be applied. The Explanatory Notes to the Harmonized Commodity Description and Coding System (EN's), which represent the official interpretation of the tariff at the international level, facilitate classification under the HTSUSA by offering guidance in understanding the scope of the headings and GRI's.

In order to determine the correct classification of "Nocolok", it must first be noted that the product is based exclusively on fluoride salts and contains no metals. As such, "Nocolok" flux would not be classified under subheading 3810.10.0000 HTSUSA. The EN's for this subheading specifically describe products used as a pickling preparation for metal surfaces which are usually comprised of dilute acids (hydrochloric, sulphuric, hydrofluoric, nitric, phosphoric, etc.), and sometimes contain alkalis (e.g., sodium hydroxide); or a preparation used as a soldering, brazing or welding powder or paste consisting of metal. See, EN's 38.10(1) and (3).

Inasmuch as "Nocolok" flux is neither a pickling preparation containing dilute acids or alkalis, nor a soldering, brazing or welding powder consisting of metal, subheading 3810.90 HTSUSA remains as the proper classification for this product. This subheading includes fluxes and other auxiliary preparations for soldering, brazing or welding and used to facilitate the joining of metals by protecting the metal surface and the solder itself from oxidation. See, e.g., EN 38.10(2).

Holding:

In view of the foregoing, the product known as "Nocolok" flux is classified in subheading 3810.90.2000, the provision for "* * * fluxes and other auxiliary preparations for soldering, brazing, or welding * * *: Other: Consisting wholly of inorganic substances," duty free at the general column one rate.

NYRL 888580 is hereby revoked.

In accordance with section 625, this ruling will become effective 60 days from its publication in the CUSTOMS BULLETIN. Publication of rulings or decisions pursuant to section 625 does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

JOHN DURANT,
Director,
Commercial Rulings Division.

19 CFR Part 177

MODIFICATION OF CUSTOMS RULING LETTERS RELATING TO ELIGIBILITY OF ARTICLES UNDER SUBHEADING 9802.00.80

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of modification of past ruling letters.

SUMMARY: Pursuant to section 625, Tariff Act of 1930 (as amended by section 623 of Title VI ("Customs Modernization") of the North American Free Trade Agreement Implementation Act, Pub. L. 103–182, 107 Stat. 2057 (1993), this notice advises interested parties that Customs is modifying past rulings pertaining to the eligibility for the partial duty exemption under subheading 9802.00.80, Harmonized Tariff Schedule of the United States (HTSUS), of medical products that are assembled abroad and sterilized. Notice of the proposed modification was published February 16, 1994, in the CUSTOMS BULLETIN, Volume 28, Number 7.

EFFECTIVE DATE: Merchandise entered, or withdrawn from warehouse for consumption, on or after June 13, 1994.

FOR FURTHER INFORMATION CONTACT: Burton Schlissel, Special Classification Branch (202–482–6980).

SUPPLEMENTARY INFORMATION:

BACKGROUND

On February 16, 1994, Customs published a notice in the CUSTOMS BULLETIN, Volume 28, Number 7, proposing to modify Headquarters Ruling Letters (HRLs) 553055, dated July 3, 1984, 554333, dated November 5, 1986, and 555154, dated March 20, 1989, concerning the eligibility for the partial duty exemption under subheading 9802.00.80, HTSUS, of medical products that are assembled abroad and sterilized. No comments were received. Pursuant to section 625, Tariff Act of 1930 (19 U.S.C. 1625), as amended by section 623 of Title VI ("Customs Modernization") of the North American Free Trade Implementation Act, Pub. L. No. 103–182, 107 Stat. 2057 (hereinafter section 625), this notice advises interested parties that Customs is modifying HRLs 553055, 554333, and 555154, to reflect that Customs will no longer consider the process of sterilization to be considered comparable to a mere cleaning process, as that term is used in subheading 9802.00.80, HTSUS, and 19 CFR 10.16(b)(1)). Customs will analyze all processes of sterilization on a case-by-case basis to determine whether the process involved is a minor operation incidental to assembly. This modification is consistent with the decisions in *United States v. Mast Industries, Inc.*, 1 CIT 230, 517 F. Supp. 694 (1981), *aff'd*, 69 CCPA 55, 668 F.2d 501 (1981), and *General Motors v. United States*, 15 CIT 372, 770 F. Supp.

641 (1991), *rev'd*, 976 F.2d 716 (Fed. Cir. 1992). The ruling modifying HRLs 553055, 554333 and 555154, is set forth in the attachment to this document.

In accordance with section 625, this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN. Publication of rulings or decisions pursuant to section 623 does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1).

Dated: March 28, 1994.

JOHN DURANT,
Director,
Commercial Rulings Division.

[Attachment]

[ATTACHMENT]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, D.C., March 28, 1994.

CLA-2 CO:R:C:S 557018 BLS
Category: 9802.00.80

MR. ALEX ROMERO, JR.
A.F. ROMERO & CO., INC.
477 Railroad Blvd.
Calexico, California 92331–0989

Re: Gas sterilization of medical products; incidental to assembly; *Mast; General Motors;* HRL 555154; HRL 554333; HRL 553055.

DEAR MR. ROMERO:

This is in further reference to your letters dated November 16, 1992 and March 5, 1993, and a subsequent submission dated May 8, 1993, on behalf of Tri-State Hospital Supply Corporation ("Tri-State"), requesting a ruling that sterilization of certain I.V. Extension sets ("I.V. sets") to be performed in Mexico will be considered an operation incidental to assembly under subheading 9802.00.80, Harmonized Tariff Schedule of the United States (HTSUS). The sets, composed of plastic components of U.S. origin, are currently being imported under subheading 9802.00.80, HTSUS. However, the sterilization process is being performed in the U.S. after assembly and importation. Samples have been submitted.

Facts:

The I.V. sets are used by hospitals to access the primary I.V. line for the main purpose of drug infusion via a syringe. Although variations exist in the configuration of the sets, due to individual hospitals utilizing different techniques, each set is used in a similar manner within the hospital.

The operations are similar for the entire product line. Each I.V. set goes through the same method of assembly, testing and packaging (the only difference being variations in plastic fittings, tubing length and complexity). In general, the sets are assembled as follows:

(1) The plastic tubing is cut to length using an automatic tubing cutter.
(2) Components specified in the Bill-Of-Material are pulled from stock.
(3) Using an assembly line production method, individual plastic components are joined to the tubing by solvent bonding. Assemblers dip one end of the tubing (about

¼") into the solvent dispenser and "wet" the area intended for connection. The tubing is then inserted into the plastic component(s). This is continued until the extension set is completely assembled. Some extension sets require clamps, valves and other items to be placed or assembled within the extension set assembly process. All actual assembly is done manually.

(4) After the bonding/assembly is complete, the extension is allowed to cure for 24–72 hours.

(5) After curing, the I.V. sets are 100% flow tested to check for clogs caused by the solvent. To do this, an end of each set is placed over an air source (manually) to ensure "continuity" throughout. Sets which are clogged are rejected.

(6) The next step is the leak test. Again, all sets are manually placed onto a test fixture which is computer controlled. The opposite end of the set is closed with a leakproof connector to allow testing for leaks. The test fixture either signals the operator to "accept" or "reject" the set. The program to start the test is prompted manually. It is possible to test four I.V. sets at a time. All sets are 100% leak tested.

(7) After the leak test, caps are manually placed or screwed onto the ends of the individual sets. These serve as "dust caps" but are also vented to allow sterilant gas to penetrate the inside of the set.

(8) After capping, the I.V. set will be manually placed into a "pouch" and are then run into a small machine called a band sealer. The band sealer closes the opening in the pouch by temporarily applying heat and pressure. The pouch serves as the "sterile barrier" after the product has been sterilized. Thus, the product is sterile until the pouch is opened by the end-user.

(9) The individually pouched extension sets will be placed manually within a corrugated box, and the boxes will be placed onto pallets. The pallets will then be moved into a room for a 12–24 hours for pre-humidification, a process which promotes the growth of bacteria through high temperature and humidity. This process facilitates sterilization. Each pallet will then be placed into a chamber for gas sterilization. Between 36,000 and 60,000 sets will be processed during the 8–10 hour period required for sterilization. The length of time required for sterilization and the number of sets sterilized during the process is dependent on the type of sets involved. However, if only one unit were to be sterilized, the period of time required for such operation would also be 8–10 hours.

(10) After sterilization, aeration and quality control inspection, the product will be imported into the United States.

Issue:

Whether sterilization of the I.V. sets in Mexico is considered a minor operation incidental to assembly under subheading 9802.00.80, HTSUS.

Law and Analysis:

Subheading 9802.00.80, HTSUS, provides a partial duty exemption for:

> [a]rticles assembled abroad in whole or in part of fabricated components, the product of the United States, which (a) were exported in condition ready for assembly without further fabrication, (b) have not lost their physical identity in such articles by change in form, shape or otherwise, and (c) have not been advanced in value or improved in condition abroad except by being assembled and except by operations incidental to the assembly process such as cleaning, lubricating and painting.

All three requirements of subheading 9802.00.80, HTSUS, must be satisfied before a component may receive a duty allowance. An article entered under subheading 9802.00.80, HTSUS, is subject to duty upon the full value of the imported assembled article less the cost or value of the U.S. components, upon compliance with the documentary requirements of section 10.24, Customs Regulations (19 CFR 10.24).

Operations incidental to the assembly process are not considered further fabrication operations, as they are of a minor nature and cannot always be provided for in advance of the assembly operations. However, any significant process, operation or treatment whose primary purpose is the fabrication, completion, physical or chemical improvement of a component precludes the application of the exemption under subheading 9802.00.80, HTSUS, to that component. *(See,* 19 CFR 10.16(c).)

In *United States v. Mast Industries Inc.,* 1 CIT 230, 517 F.Supp. 694 (1981), *aff'd,* 69 CCPA 55, 668 F.d 501 (1981), the court stated that Congress intended a balancing of all relevant factors to ascertain whether an operation of a "minor nature" is incidental to the assembly process. The court indicated that dependent on the particular case, relevant factors may include:

(1) the relative cost and time of the particular operation;
(2) whether the operation is necessary to the assembly process;
(3) whether the operation is so related to the assembly that it is logically performed during assembly; and
(4) if performed concurrently with assembly, whether economic or practical considerations dictate that the operations be so performed.

In *General Motors Corp. v. U.S.*, 15 CIT 372, 770 F. Supp. 641 (1991), *rev'd*, 976 F.2d 716 (Fed. Cir. 1992), the Court of International Trade held that topcoat painting operations performed on U.S.-origin sheet metal components shipped to Mexico for assembly into automobiles were "incidental to assembly" within the meaning of TSUSA item 807.00 (now HTSUS subheading 9802.00.80). On appeal, the Court of Appeals for the Federal Circuit reversed the lower court and held that, considering the cost of all of the painting operations performed abroad (including undercoating, sanding, baking, topcoating, and waxing), these operations were not minor, and, therefore, not "incidental to assembly." As a result, no duty allowance under item 807.00 was permitted for the cost or value of the U.S. components which were subjected to the painting operations.

The appellate court reasoned that, although item 807.00 specifically refers to "painting," it is simply an example of an operation which is potentially incidental to the assembly process—not a definitive statement that all painting operations, no matter how extensive, are allowed under item 807.00(c)." The court recognized from the statute's legislative history that only operations (including painting) "of a minor nature incidental to the assembly process" are permitted. *Id.* at 719.

In the instant case, the time required for the sterilization operation is 8–10 hours, whether 36,000 units or one (1) unit is sterilized. A pre-humidification process, of 12–24 hours, is also required to prepare the merchandise for sterilization. (It is noted that on a per man-hour basis, the average productivity rate is 26.7 units, which includes assembly, testing, and packaging, but not pre-sterilization or sterilization.) The substantial time required to ensure that the I.V. sets are properly sterilized supports a finding that the process is a significant, and not a minor, operation. In this regard, special equipment is required for the sterilization operation, which requires exposure of the material to a sterilant gas of a precise concentration for a specific-period of time at a special temperature and humidity level and at a particular pressure. The significance of the process is underscored by the fact that the I.V. sets could not be used for their intended purpose without being sterilized. While on a per unit basis the cost of the process as a percentage of the cost of the U.S. components is not significant as compared to the cost of the U.S. components (3%–3½%), it is noted that the capital investment in the sterilization equipment and facilities ($52,000) will approximate one-third the cost of the investment required for assembly ($152,700).

With regard to the other relevant factors, it is apparent that sterilization is not a prerequisite to assembly of the I.V. sets, since it is performed after assembly, and it is not directly related to the assembly process.

Accordingly, after balancing all of the relevant factors, we find that the sterilization operation in this case is not a minor operation incidental to the assembly process.

Prior Decisions—Sterilization:

In prior Headquarters decisions, we found that sterilization was an operation incidental to assembly. Thus, Headquarters Ruling Letter (HRL) 553055, dated July 3, 1984, involved the sterilization by heat of cotton-tipped applicators; HRL 554333, dated November 5, 1986, involved drugs that were dissolved, filtered, and placed in a sterile environment; and in HRL 555154, dated March 20, 1989, certain medical products were gas sterilized. In HRL 554333, we stated that sterilizing assembled components for "ultimate use in surgical operations or prospective care is comparable to a cleaning process and, as such, can be considered incidental to the overall assembly process". In HRL 555154, we followed HRL 554333 in holding that the gas sterilization operation therein involved was similarly comparable to a cleaning process and therefore incidental to assembly. In this regard, section 10.16(b), Customs Regulations (19 CFR 10.16(b)), includes "cleaning" as one of the enumerated examples of operations which are incidental to the assembly process.

Based on the decisions in *Mast* and *General Motors, supra*, Customs will no longer consider sterilization to be comparable to a cleaning process and incidental to assembly, without an analysis of the relevant factors in each case as set forth by the court in *Mast*. Customs will determine whether a particular process of sterilization is incidental to

assembly in the same manner as any other operation which is not actually part of the assembly process. A case-by-case methodology will be used, based on the criteria set forth in *Mast*.

Holding:

Sterilization of the assembled I.V. sets in Mexico is considered a significant operation, and not a minor operation incidental to assembly, under the provisions of subheading 9802.00.80, HTSUS. Therefore, the I.V. sets are not eligible for a partial duty exemption upon importation into the U.S. Any sterilization operation which is not an actual part of the assembly process will be analyzed on a case-by-case basis to determine whether such operation is incidental to assembly. HRLs 555154, 554333, and 553055 are modified to the extent that they may have held that any process of sterilization is a minor operation incidental to assembly.

In accordance with section 625, this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN. Publication of rulings or decisions pursuant to section 623 does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1).

JOHN DURANT,
Director,
Commercial Rulings Division.

PROPOSED MODIFICATION OF CUSTOMS RULING LETTERS RELATING TO TARIFF CLASSIFICATION OF AGGLOMERATED STONE ARTICLES

ACTION: Notice of proposed modification of tariff classification ruling letters.

SUMMARY: Pursuant to section 625, Tariff Act of 1930 (19 U.S.C. 1625), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103–182, 107 Stat. 2057, 2186 (1993), this notice advises interested parties that Customs intends to modify rulings pertaining to the tariff classification of figurines manufactured from calcium carbonate and plastic resin. Comments are invited on the correctness of the proposed rulings.

DATE: Comments must be received on or before May 13, 1994.

ADDRESS: Written comments are to be addressed to U.S. Customs Service, Office of Regulations and Rulings, Attention: Commercial Rulings Division, 1301 Constitution Avenue, N.W., (Franklin Court), Washington, D.C., 20229. Comments submitted may be inspected at the Commercial Rulings Division, Office of Regulations and Rulings, located at Franklin Court, 1099 14th St., N.W., Suite 4000, Washington, D.C.

FOR FURTHER INFORMATION CONTACT: Kathleen Clarke, Metals and Machinery Classification Branch, (202) 482–7030.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to section 625, Tariff Act of 1930 (19 U.S.C. 1625), as amended by section 623 of Title VI (Customs Modernization) of the

North American Free Trade Agreement Implementation Act, Pub. L. 103–182, 107 Stat. 2057, 2186 (1993), this notice advises interested parties that Customs intends to modify rulings pertaining to the tariff classification of figurines manufactured from calcium carbonate and plastic resin.

In Headquarters Ruling Letter (HRL) 951422 dated November 25, 1992, the "Spirit Santa" and "Tannenbaum Santa" figurines were classified under subheading 9505.10.40, Harmonized Tariff Schedule of the United States (HTSUS), as other articles for Christmas festivities made of plastic, and the "Cornucopia Santa" was classified under subheading 3926.40.00, HTSUS, as plastic statuettes and other ornamental articles. These figurines were described as being manufactured from poly-resin. However, we are now aware that the figurines are manufactured with calcium carbonate agglomerated with plastics. This ruling letter is set forth in Attachment A to this document.

In HRL 951459 dated March 17, 1993, the "Soda Pop" figurine was classified under subheading 9505.10.40, HTSUS, as other articles for Christmas festivities made of plastic, and the "Kris Kringle" and "Dedt Moroz" figurines were classified under subheading 3926.40.00, HTSUS, as plastic statuettes and other ornamental articles. These figurines are manufactured with unsaturated poly-resin and calcium carbonate. This ruling letter is set forth in Attachment B to this document.

Customs Headquarters is of the opinion that since the figurines are manufactured with poly-resin and calcium carbonate they are not regarded as plastic figurines, but are properly classified as agglomerated stone figurines.

Customs intends to modify HRL 951422 and HRL 951459 to reflect the proper classification of the subject articles under either subheading 9505.10. 50, HTSUS, as other articles for Christmas festivities, or subheading 6810.99.00, HTSUS, as other articles of artificial stone. Proposed HRL 955392 modifying HRL 951422 is set forth in Attachment C and proposed HRL 956098 modifying HRL 951459 is set forth in Attachment D to this document.

Claims for detrimental reliance under section 177.9, Customs Regulations (19 CFR 177.9), will not be entertained for actions occurring on or after the date of publication of this notice.

Dated: March 29, 1994.

JOHN DURANT,
Director,
Commercial Rulings Division.

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, D.C., November 25, 1994.
CLA–2 CO:R:C:F 951422 LPF
Category: Classification
Tariff No. 9505.10.40 and 3926.40.00

MS. ANNA HETTINGER
ATTORNEY IN FACT
EXPEDITORS INTERNATIONAL OF WASHINGTON, INC.
5180–A Smith Road
Denver, CO 80216

Re: Modification of NYRL 860031; "Spirit Santa," "Tannenbaum Santa" and "Cornucopia Santa" poly-resin figurines: Heading 9505, HTSUSA, Festive articles; Heading 3926, HTSUSA, Other articles of plastics.

DEAR MS. HETTINGER:

In New York Ruling Letter (NYRL) 860031, issued February 20, 1991, poly-resin figurines, from Taiwan, were classified in subheading 9505.10.40, Harmonized Tariff Schedule of the United States Annotated (HTSUSA), as "Festive, carnival or other entertainment articles, * * *: Articles for Christmas festivities and parts and accessories thereof: Other [than Christmas ornaments]: Of plastics." We have reviewed that ruling and have found it to be partially in error. The correct classification is as follows.

Facts:

The articles at issue include "Spirit Santa" (Item #00149), "Tannenbaum Santa" (Item #00157) and "Cornucopia Santa" (Item #00141). The figurines are made from poly-resin and are each 9¼ inches in height. The Spirit Santa wears a red robe and cap, has a beard and moustache and carries a sack stuffed with gifts. The Tannenbaum Santa wears a red robe, has a beard and moustache and carries a small fir tree in his hand and a sack filled with fruit and nuts on his back. The Cornucopia Santa wears a hooded blue cloak, has a beard and moustache and holds a horn of plenty and a garland of pine boughs.

Issue:

Whether the figurines are classifiable in heading 3926 as other articles of plastics or rather in heading 9505 as festive articles.

Law and Analysis:

The General Rules of Interpretation (GRI's) taken in their appropriate order provide a framework for classification of merchandise under the HTSUSA. Most imported goods are classified by application of GRI 1, that is, according to the terms of the headings of the tariff schedule and any relative section or chapter notes. The Explanatory Notes (EN's) to the Harmonized Commodity Description and Coding System, which represent the official interpretation of the tariff at the international level, facilitate classification under the HTSUSA by offering guidance in understanding the scope of the headings and GRI's.

Heading 9505 provides for, *inter alia*, festive, carnival and other entertainment articles. The EN's to 9505 indicate that the heading covers:

> (A) Festive, carnival or other entertainment articles, which in view of their intended use are generally made of non-durable material. They include:
>
> (1) Decorations such as festoons, garlands, Chinese lanterns, etc., as well as various decorative articles made of paper, metal foil, glass fibre, etc., for Christmas trees (e.g., tinsel, stars, icicles), artificial snow, coloured balls, bells, lanterns, etc. Cake and other decorations (e.g., animals, flags) which are traditionally associated with a particular festival are also classified here.
>
> (2) Articles traditionally used at Christmas festivities, e.g., artificial Christmas trees (these are sometimes of the folding type), nativity scenes, Christmas crackers, Christmas stockings, imitation yule logs * * *.
>
> * * * * * * *

In general, merchandise is classifiable in heading 9505, HTSUSA, as a *festive article* when the article, *as a whole:*

> 1. is of non-durable material or, generally, is not purchased because of its extreme worth, or intrinsic value (e.g., paper, cardboard, metal foil, glass fiber, plastic, wood);

2. functions primarily as a decoration (e.g., its primary function is not utilitarian); and

3. is traditionally associated or used with a particular festival (e.g., stockings and tree ornaments for Christmas, decorative eggs for Easter).

An article's satisfaction of these three criteria is indicative of classification as a festive article. The motif of an article is not dispositive of its classification and, consequently, does not transform an item into a festive article.

First, the figurines are made of non-durable material. Customs will consider articles, such as the Santa figurines, to be made of non-durable material since they are not designed for sustained wear and tear, nor are purchased because of their extreme worth or value (as would be the case with a decorative, yet costly, piece of art or crystal).

Next, the articles' primary function is decorative, as opposed to, utilitarian. It is apparent, the figurines serve no useful function besides their role as decoration.

Finally, when examining the Spirit Santa and Tannenbaum Santa figurines, as a whole, it is evident that the articles are traditionally associated or used with the particular festival of Christmas. This is not the case with the Cornucopia Santa.

Generally, figurines and dolls are not traditionally associated or used with the particular festival of Christmas; they are not *ejusdem generis* with those articles cited in the EN's to 9505, as exemplars of traditional, festive articles. However, Santa Claus is a unique *form* that traditionally has been associated, particularly and exclusively, with Christmas. Since the motif of an article is not dispositive of its classification, only three dimensional forms of Santa Claus, identifiable as such upon importation, are classifiable within 9505 as festive articles. *See* Headquarters Ruling Letter 088584, issued September 15, 1992, where decorative plates with flat renditions of a nativity scene and a holiday motif were classified as other than festive articles.

The fact that the Spirit Santa and Tannenbaum Santa figurines both have a beard and moustache, wear a cap and oversized robe (similar to a coat), and carry a sack of gifts, indicates that the articles are identifiable upon importation as Santa Claus. The Cornucopia Santa which does not possess most of these characteristics, is distinguishable only as an old man and is not identifiable upon importation as Santa Claus.

We also note that the articles are three dimensional, because they are not designed or effective primarily as a flat or surface composition, but rather are specifically designed to give an illusion of depth or varying distances. *See Webster's Third New International Dictionary* 2474 (1971). For these reasons, the Spirit Santa and Tannenbaum Santa figurines are classifiable, pursuant to GRI 1, in 9505 as festive articles.

The Santa figurines are classifiable within subheading 9505.10 which provides for articles for Christmas festivities. As for the proper classification of the Santa figurines at the eight digit subheading level, subheadings 9505.10.10, 9505.10.15 and 9505.10.25 cover Christmas ornaments of glass, wood and other, respectively. To qualify as a Christmas ornament, Customs looks to the following three criteria:

1. that the item is advertised and sold as a Christmas tree ornament;

2. that there is some method, generally a loop attached to the top, to hang the item on a tree; and

3. that item is not too big or too heavy to be hung or attached to a tree.

The Santa figurines do not meet these criteria. Consequently, they are not classifiable as Christmas ornaments.

Subheading 9505.10.40, covers other Christmas articles of plastics, while subheading 9505.10.50, covers other Christmas articles made of other materials. As the Santa figurines are composed of plastic, they are classifiable in subheading 9505.10.40.

Because the Cornucopia Santa is not classifiable in 9505 as a festive article, it must be classified elsewhere. Heading 3926 provides for other articles of plastics or materials of headings 3901 to 3914. Since the plastic figurine is ornamental, it is classifiable in subheading 3926.40.00.

Holding:

The Spirit Santa and Tannenbaum Santa figurines remain classifiable in subheading 9505.10.4000, HTSUSA, as "Festive, carnival or other entertainment articles, * * * Articles for Christmas festivities and parts and accessories thereof: Other [than Christmas ornaments]: Of plastics." The general column one rate of duty is 8.4 percent *ad valorem*.

The Cornucopia Santa is classifiable in subheading 3926.40.00, HTSUSA, as "Other articles of plastics and articles of other materials of headings 3901 to 3914: Statuettes and other ornamental articles." The general column one rate of duty is 5.3 percent *ad valorem*.

NYRL 860031 is modified accordingly.

JOHN DURANT,
Director,
Commercial Rulings Division.

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, D.C., March 17, 1994.

CLA–2 CO:R:C:F 951459 LPF
Category: Classification
Tariff No. 9505.10.40 and 3926.40.00

MR. JOE SCHMID
J.S. INTERNATIONAL
110 West Ocean Blvd., Suite 307
Long Beach, CA 90802

Re: Modification of NYRL 857808; "Dedt Moroz," "Kris Kringle," and "Soda Pop" poly-resin figurines; Heading 9505, HTSUSA, Festive articles; Heading 3926, HTSUSA, Other articles of plastics; HRL 951422, 952520

DEAR MR. SCHMID:

In New York Ruling Letter (NYRL) 857808, issued December 4, 1990, poly-resin figurines, from Taiwan, were classified in subheading 9505.10.40, Harmonized Tariff Schedule of the United States Annotated (HTSUSA), as "Festive, carnival or other entertainment articles, * * *: Articles for Christmas festivities and parts and accessories thereof: Other [than Christmas ornaments]: Of plastics." We have reviewed that ruling and have found it to be partially in error. The correct classification is as follows.

Facts:

The articles at issue include "Dedt Moroz" (Item # 1651), "Kris Kringle" (Item # 1657), and "Soda Pop" (Item # 1658). The figurines are made from unsaturated poly-resin and calcium carbonate. "Dedt Moroz" is described as Russia's "Grandfather Frost" who rewarded good behavior by bestowing diamonds and froze those who angered him. The figurine, appearing to be blown back from the wind, is wearing a wind-blown, faded cloak, cap, and ice boots, has a beige moustache and beard, and is holding a walking stick. "Kris Kringle" is described as the derivative of Christ kindli, German for Christchild. The thin figurine has a beard and moustache, is wearing a long, flowing cloak and hood, and is holding a pine tree. "Soda Pop" has a beard, moustache and fat belly, is wearing an oversized, fur-lined coat with buckle, a cap, and boots, and is holding a bottle of soda pop.

Issue:

Whether the figurines are classifiable in heading 3926 as other articles of plastics or rather in heading 9505 as festive articles.

Law and Analysis:

The General Rules of Interpretation (GRI's) taken in their appropriate order provide a framework for classification of merchandise under the HTSUSA. Most imported goods are classified by application of GRI 1, that is, according to the terms of the headings of the tariff schedule and any relative section or chapter notes. The Explanatory Notes (EN's) to the Harmonized Commodity Description and Coding System, which represent the official interpretation of the tariff at the international level, facilitate classification under the HTSUSA by offering guidance in understanding the scope of the headings and GRI's.

Heading 9505 provides for, *inter alia,* festive, carnival and other entertainment articles. The EN's to 9505 indicate that the heading covers:

> (A) Festive, carnival or other entertainment articles, which in view of their intended use are generally made of non-durable material. They include:

(1) Decorations such as festoons, garlands, Chinese lanterns, etc., as well as various decorative articles made of paper, metal foil, glass fibre, etc., for Christmas trees (e.g., tinsel, stars, icicles), artificial snow, coloured balls, bells, lanterns, etc. Cake and other decorations (e.g., animals, flags) which are traditionally associated with a particular festival are also classified here.

(2) Articles traditionally used at Christmas festivities, e.g., artificial Christmas trees (these are sometimes of the folding type), nativity scenes, Christmas crackers, Christmas stockings, imitation yule logs * * *.

* * * * * * *

In general, merchandise is classifiable in heading 9505, HTSUSA, as a *festive article* when the article, *as a whole:*

1. is of non-durable material or, generally, is not purchased because of its extreme worth, or intrinsic value (e.g., paper, cardboard, metal foil, glass fiber, plastic, wood);

2. functions primarily as a decoration (e.g., its primary function is not utilitarian); and

3. is traditionally associated or used with a particular festival (e.g., stockings and tree ornaments for Christmas, decorative eggs for Easter).

An article's satisfaction of these three criteria is indicative of classification as a festive article. The motif of an article is not dispositive of its classification and, consequently, does not transform an item into a festive article.

First, the figurines are made of non-durable material. Customs will consider articles, such as the Santa figurines, to be made of non-durable material since they are not designed for sustained wear and tear, nor are purchased because of their extreme worth or value (as would be the case with a decorative, yet costly, piece of art or crystal).

Next, the articles' primary function is decorative, as opposed to, utilitarian. It is apparent, the figurines serve no useful function besides their role as decoration.

Finally, when examining the Soda Pop figurine, as a whole, it is evident that the article is traditionally associated or used with the particular festival of Christmas. This is not the case with the Kris Kringle or Dedt Moroz figurines.

Generally, figurines and dolls are not traditionally associated or used with the particular festival of Christmas; they are not *ejusdem generis* with those articles cited in the EN's to 9505, as exemplars of traditional, festive articles. However, Santa Claus is a unique *form* that traditionally has been associated, particularly and exclusively, with Christmas. Since the motif of an article is not dispositive of its classification, only three dimensional forms of Santa Claus, identifiable as such upon importation, are classifiable within 9505 as festive articles.

In regard to festive articles, we note that, in part, the applicable standard is "traditionally associated or used with a particular festival." It is our understanding that "traditional use," as referred to in the EN's to 9505, means traditional use in the United States at the time of importation. Similarly, in the cases of *Sanji Kobata et al. v. United States,* 66 Cust. Ct. 341, C.D. 4213 (1971), *W & J Sloane, Inc. v. United States,* 76 Cust. Ct. 62, C.D. 4636 (1976), and *J.E. Mamiye & Sons, Inc. v. United States,* 85 Cust. Ct. 92, C.D. 4878 (1980), the court considered the use of various articles in the United States in order to determine whether they were classifiable within certain *eo nomine* provisions. Furthermore, we note that the language included in Additional U.S. Note 1(a) indicates that a tariff classification controlled by use is also determined in accordance with the use of the article in the United States.

Accordingly, traditional uses, from other countries regarding particular festivals, do not necessarily give rise to articles that are traditionally used in the United States as festive articles. Thus, regardless of the way such articles may be recognized in their country of origin, they may not be classifiable within heading 9505.

The fact that the Soda Pop figurine has a beard, moustache, and fat belly, and wears an oversized coat with buckle, a cap, and boots indicates that the article is identifiable upon importation as Santa Claus. The Kris Kringle and Dedt Moroz figurines, which do not possess most of these characteristics, are distinguishable only as an old man, or perhaps as a friar or cleric, and are not identifiable upon importation as Santa Claus. We note that the latter figurines are identified as "*original* designs depicting legendary Santas." Although the Santas depicted may be readily recognizable as traditional in other countries, they are not recognized as a substantial part of the U.S. tradition.

We also note that the Soda Pop figurine is three dimensional, because it is not designed or effective primarily as a flat or surface composition, but rather is specifically designed to

give an illusion of depth or varying distances. *See Webster's Third New International Dictionary* 2474 (1971). For these reasons, the Soda Pop figurine is classifiable, pursuant to GRI 1, in 9505 as a festive article. *See* Headquarters Ruling Letters 951422, issued November 25, 1992 and 952520, issued October 22, 1992.

The Santa figurine is classifiable within subheading 9505.10 which provides for articles for Christmas festivities. At the eight digit subheading level, the Santa figure is not classifiable in subheadings 9505.10.10, 9505.10.15 and 9505.10.25 which cover Christmas ornaments of glass, wood and other, respectively. The Santa figure does not meet our criteria for Christmas ornaments. *See* HRL 951422, *supra.*

Subheading 9505.10.40, covers other Christmas articles of plastics, while subheading 9505.10.50, covers other Christmas articles made of other materials. As the Santa figurine is composed of plastic, it is classifiable in subheading 9505.10.40.

Because the Kris Kringle and Dedt Moroz figurines are not classifiable in 9505 as festive articles, they must be classified elsewhere. Heading 3926 provides for other articles of plastics or materials of headings 3901 to 3914. Since the plastic figurines are ornamental, they are classifiable in subheading 3926.40.00.

Holding:

The Soda Pop figurine remains classifiable in subheading 9505.10.4000, HTSUSA, as "Festive, carnival or other entertainment articles, * * * Articles for Christmas festivities and parts and accessories thereof: Other [than Christmas ornaments]: Of plastics." The general column one rate of duty is 8.4 percent *ad valorem.*

The Kris Kringle and Dedt Moroz figurines are classifiable in subheading 3926.40.00, HTSUSA, as "Other articles of plastics and articles of other materials of headings 3901 to 3914: Statuettes and other ornamental articles." The general column one rate of duty is 5.3 percent *ad valorem.*

NYRL 857808 is modified accordingly.

JOHN DURANT,
Director,
Commercial Rulings Division.

[ATTACHMENT C]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, D.C.

CLA-2 CO:R:C:M 955392 KCC
Category: Classification
Tariff No. 6810.99.00 and 9505.10.50

MS. ANNA HETTINGER
EXPEDITORS INTERNATIONAL OF WASHINGTON, INC.
5180-A Smith Road
Denver, CO 80216

Re: HRL 951422 modified; "Spirit Santa," "Tannenbaum Santa" and "Cornucopia Santa" figurines; poly-resin and calcium carbonate; EN 68.10.

DEAR MS. HETTINGER:

This is in reference to Headquarters Ruling Letter (HRL) 951422 issued to you on November 25, 1992, which concerned the tariff classification of "Spirit Santa," "Tannenbaum Santa" and "Cornucopia Santa" figurines under the Harmonized Tariff Schedule of the United States (HTSUS).

Facts:

HRL 951422 classified the "Spirit Santa" (Item #00149) and "Tannenbaum Santa" (Item #00157) under subheading 9505.10.40, HTSUS, as other articles for Christmas festivities made of plastic, and classified the "Cornucopia Santa" (Item #00141) under subheading 3926.40.00, HTSUS, as plastic statuettes and other ornamental articles. HRL

951422 described the figurines as being made from poly-resin. However, we are now aware that the figurines are actually made from calcium carbonate agglomerated with plastics.

Issue:

What is the proper classification of the "Spirit Santa," "Tannenbaum Santa" and "Cornucopia Santa" figurines made from calcium carbonate agglomerated with plastics under the HTSUS?

Law and Analysis:

The classification of merchandise under the HTSUS is governed by the General Rules of Interpretation (GRI's). GRI 1, HTSUS, states, in part, that "for legal purposes, classification shall be determined according to terms of the headings and any relative section or chapter notes * * *."

Since the figurines are actually made from calcium carbonate agglomerated with plastics, they are no longer classifiable as articles of plastics. We are of the opinion that the figurines are articles of artificial stone which are classifiable under heading 6810, HTSUS.

In understanding the language of the HTSUS, the Harmonized Commodity Description and Coding System ENs may be utilized. The ENs, although not dispositive, are to be used to determine the proper interpretation of the HTSUS. *See,* T.D. 89–80, 54 Fed. Reg. 35127, 35128 (August 23, 1989). EN 68.10 (pg. 905) states that:

> Artificial stone is an imitation of natural stone obtained by agglomerating pieces of natural stone or crushed or powdered natural stone (limestone, marble, granite, porphyry, serpentine, etc.) with lime or cement or other binders (e.g., plastics). Articles of artificial stone include those of "terrazzo", "granito", etc. * * *
>
> The heading includes, *inter alia,* * * * vases, flower pots, architectural or garden ornaments; statues, statuettes, animal figures; ornamental goods * * *

EN 68.10 specifically states that artificial stone consists of natural stone *(i.e.,* calcium carbonate) agglomerated with binders *(i.e.,* plastics). We are of the opinion that the crucial factor which makes a product an article of artificial stone is the uniform blending of the natural stone material with the binding material. Pursuant to EN 68.10, the figurines at issue are clearly articles of artificial stone. They are made from calcium carbonate agglomerated with plastics.

As the figurines are articles of artificial stone, they are not classifiable as articles of plastics. Therefore, the "Cornucopia Santa" figurine is classified under subheading 6810.99.00, HTSUS, as other articles of artificial stone. The "Spirit Santa" and "Tannenbaum Santa" figurines, which are considered festive articles pursuant to HRL 951422, are classified under subheading 9505.10.50, HTSUS, as other articles for Christmas festivities.

Holding:

The "Cornucopia Santa" figurine is classified under subheading 6810.99.00, HTSUS, as other articles of artificial stone, which is dutiable at the Column 1 rate of 4.9% *ad valorem.*

The "Spirit Santa" and "Tannenbaum Santa" figurines are classified under subheading 9505.10.50, HTSUS, as other articles for Christmas festivities, which is dutiable at the Column 1 rate of 5.8% *ad valorem.*

HRL 951422 dated November 25, 1992, is modified as set forth above.

JOHN DURANT,
Director,
Commercial Rulings Division.

[ATTACHMENT D]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, D.C.

CLA–2 CO R:C:M 956098 KCC
Category: Classification
Tariff No. 6810.99.00 and 9505.10.50

MR. JOE SCHMID
J.S. INTERNATIONAL
110 West Ocean Blvd., Suite 307
Long Beach, California 90802

Re: HRL 951459 modified; "Dedt Moroz," "Kris Kringle," and "Soda Pop" figurines; poly-resin and calcium carbonate; EN 68.10.

DEAR MR. SCHMID:

This is in reference to Headquarters Ruling Letter (HRL) 951459 issued to you on March 17, 1993, which concerned the tariff classification of "Dedt Moroz," "Kris Kringle," and "Soda Pop" figurines under the Harmonized Tariff Schedule of the United States (HTSUS).

Facts:

HRL 951459 classified the "Soda Pop" (Item #1658) under subheading 9505.10.40, HTSUS, as other articles for Christmas festivities made of plastic, and classified the "Dedt Moroz" (Item #1651) and "Kris Kringle" (Item #1657) under subheading 3926.40.00, HTSUS, as plastic statuettes and other ornamental articles. HRL 951459 described the figurines as being made from unsaturated poly-resin and calcium carbonate.

Issue:

What is the proper classification of the "Dedt Moroz," "Kris Kringle," and "Soda Pop" figurines made from poly-resin and calcium carbonate under the HTSUS?

Law and Analysis:

The classification of merchandise under the HTSUS is governed by the General Rules of Interpretation (GRI's). GRI 1, HTSUS, states, in part, that "for legal purposes, classification shall be determined according to terms of the headings and any relative section or chapter notes * * *."

Since the figurines are made from poly-resin and calcium carbonate, they are no longer classifiable as articles of plastics. We are of the opinion that the figurines are articles of artificial stone which are classifiable under heading 6810, HTSUS.

In understanding the language of the HTSUS, the Harmonized Commodity Description and Coding System ENs may be utilized. The ENs, although not dispositive, are to be used to determine the proper interpretation of the HTSUS. *See*, T.D. 89–80, 54 Fed. Reg. 35127, 35128 (August 23, 1989). EN 68.10 (pg. 905) states that:

> Artificial stone is an imitation of natural stone obtained by agglomerating pieces of natural stone or crushed or powdered natural stone (limestone, marble, granite, porphyry, serpentine, etc.) with lime or cement or other binders (e.g., plastics). Articles of artificial stone include those of "terrazzo", "granito", etc. * * *
>
> The heading includes, *inter alia*, * * * vases, flower pots, architectural or garden ornaments; statues, statuettes, animal figures; ornamental goods * * *.

EN 68.10 specifically states that artificial stone consists of natural stone *(i.e.,* calcium carbonate) agglomerated with binders *(i.e.,* poly-resin). We are of the opinion that the crucial factor which makes a product an article of artificial stone is the uniform blending of the natural stone material with the binding material. Pursuant to EN 68.10, the figurines at issue are articles of artificial stone. They are made from poly-resin and calcium carbonate.

As the figurines are articles of artificial stone, they are not classifiable as articles of plastics. Therefore, the "Dedt Moroz" and "Kris Kringle" figurines are classified under subheading 6810.99.00, HTSUS, as other articles of artificial stone. The "Soda Pop" figurine, which is considered a festive article pursuant to HRL 951459, is classified under subheading 9505.10.50, HTSUS, as other articles for Christmas festivities.

Holding:

The "Dedt Moroz" and "Kris Kringle" figurines are classified under subheading 6810.99.00, HTSUS, as other articles of artificial stone, which is dutiable at the Column 1 rate of 4.9% *ad valorem*.

The "Soda Pop" figurine is classified under subheading 9505.10.50, HTSUS, as other articles for Christmas festivities, which is dutiable at the Column 1 rate of 5.8% *ad valorem*.

HRL 951459 dated March 17, 1993, is modified as set forth above.

JOHN DURANT,
Director,
Commercial Rulings Division.

PROPOSED REVOCATION OF CUSTOMS RULING LETTERS RELATING TO TARIFF CLASSIFICATION OF GLASSES

ACTION: Notice of proposed revocation of tariff classification ruling letters.

SUMMARY: Pursuant to section 625, Tariff Act of 1930 (19 U.S.C. 1625), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103–182, 107 Stat. 2057, 2186 (1993), this notice advises interested parties that Customs intends to revoke past rulings pertaining to the tariff classification of glasses which, after importation, are filled with candle wax and a wick. Comments are invited on the correctness of the proposed rulings.

DATE: Comments must be received on or before May 13, 1994.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to U.S. Customs Service, Office of Regulations and Rulings, Attention: Commercial Rulings Division, 1301 Constitution Avenue, N.W., (Franklin Court), Washington, D.C., 20229. Comments submitted may be inspected at the Commercial Rulings Division, Office of Regulations and Rulings, located at Franklin Court, 1099 14th St., N.W., Suite 4000, Washington, D.C.

FOR FURTHER INFORMATION CONTACT: Kathleen Clarke, Metals and Machinery Classification Branch, (202) 482–7030.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to section 625, Tariff Act of 1930 (19 U.S.C. 1625), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103–182, 107 Stat. 2057, 2186 (1993), this notice advises interested parties that Customs intends to revoke past rulings pertaining to the tariff classification of glasses which, after importation, are filled with candle wax and a wick.

In DD 881552 dated January 12, 1993, the District Director, Ogdensburg, New York, classified certain glasses under subheading 7013.29.10 or 7013.29.20, HTSUS, as drinking glasses. Classification to the exact eight digit level is dependant upon the value of the glasses. This ruling letter is set forth in Attachment A to this document.

In Headquarters Ruling Letters (HRL) 088123 dated February 25, 1991, and HRL 951391 dated August 10, 1992, certain glasses were classified under subheading 7013.29.10, HTSUS, as drinking glasses. These ruling letters are set forth in Attachments B and C to this document.

In New York Ruling (NY) 870585 dated January 28, 1992, certain glasses were classified under subheading 7013.29.10, HTSUS, as drinking glasses. This ruling letter is set forth in Attachment D to this document.

Customs Headquarters is of the opinion that the glasses at issue are not of the class or kind of drinking glasses contemplated by subheading 7013.29, HTSUS. The size and design features of the subject glasses, i.e., mold seams, knurling, beaded flange finish and embedded manufacturing information, are not the type of physical characteristics associated with drinking glasses.

Customs Headquarters maintains that the glasses under consideration in DD 881551, HRL 088123 and HRL 951391 are classifiable under subheading 9405.50.40, HTSUS, as nonelectrical lamps and light fittings. Explanatory Note (EN) 94.05 of the Harmonized Commodity Description and Coding System (pgs. 933–934), states that lamps and light fittings of this group can be composed of any material and use any source of light, including candles. Moreover, EN 94.05 states that heading 9405, HTSUS, covers "candelabra, candlesticks, and candle brackets." We are of the opinion that the glasses at issue are, in fact, candlesticks as the term is used in the ENs.

Additionally, Customs Headquarters maintains that the glasses in NY 870585 are classifiable under subheading 7013.99.35, HTSUS, as votive-candle holders. The size of the glasses in NY 870585 is indicative of the common votive-candle holder used in churches and homes for devotional purposes.

Customs intends to revoke DD 881552, HRL 088123 and HRL 951391 to reflect the proper classification of the subject articles under subheading 9405.50.40, HTSUS, as non-electrical lamps and lighting fittings. The proposed ruling revoking DD 881552 is set forth in Attachment E and the proposed ruling revoking HRL 088123 and HRL 951391 is set forth in Attachment F to this document. Additionally, Customs intends to revoke NY 870585 to reflect the proper classification of the subject glasses under subheading 7013.99.35, HTSUS, as votive-candle holders. The proposed ruling revoking NY 870585 is set forth in Attachment G to this document. Before taking action on the above rulings, consideration will be given to any written comments timely received.

Claims for detrimental reliance under section 177.9, Customs Regulations (19 CFR 177.9), will not be entertained for actions occurring on or after the date of publication of this notice.

Dated: March 25, 1994.

JOHN DURANT,
Director,
Commercial Rulings Division.

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Ogdensburg, N.Y., January 12, 1993.

CLA–2–70:S:N:N:D06:PF
Category: Classification
Tariff No. 7013.29.1000 and 7013.29.2000

MR. STEVE LIPTAK
INTER-MARITIME FORWARDING CO., INC.
156 William St.
New York, NY 10038

Re: The tariff classification of glasses, products of Taiwan.

DEAR MR. LIPTAK:

In your letter dated December 29, 1992 you requested a tariff classification ruling.

You furnished three samples of what you referred to as glass candleholders. Your importer, H & H Glass, Inc., evidently obtained affidavits regarding their end use from two clients, apparently candle making firms, which you included in your submission. These affidavits are to the effect that the glass containers will made into candles by filling with wax after importation.

The submitted samples are further described as "item #303 Fifty-Clear Glass, item # Continental Diamond, and Item # 50 Hr GWC Tumbler". They are about 5" tall and 2¾" wide. No unit value was advised. The value per unit is believed to not exceed $3 each. Two have a slight taper, the other is straight sided with a slight bulge at mouth and base. They have the appearance of drinking glasses, indeed, one being described as a "tumbler", as noted above. These items are considered, accordingly, to be drinking glasses, affidavits as to end use not withstanding.

The applicable subheading for the drinking glasses will be 7013.20.1000 or 7013.29.2000, Harmonized Tariff Schedule of the United States (HTS), which provides for "Glassware of a kind used for table, kitchen, toilet, office, indoor decoration, or similar purposes (other than that of heading 7010 or 7018): Drinking glasses, other than of glass-ceramics: Other: Valued not over $0.30 each" or "* * * Valued over $0.30 but not over $3 each". The rate of duty will be 38% or 30%, respectively, as applicable.

This ruling is being issued under the provisions of Section 177 of the Customs Regulations (19 C.F.R. 177).

A copy of this ruling letter should be attached to the entry documents filed at the time this merchandise is imported. If the documents have been filed without a copy, this ruling should be brought to the attention of the Customs officer handling the transaction.

WILLIAM D. DIETZEL,
District Director.

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, D.C., February 25, 1991.

CLA–2 CO: R:C:F 088123 JGH
Category: Classification
Tariff No. 7013.29.10

DISTRICT DIRECTOR OF CUSTOMS
PORT OF LOS ANGELES–LONG BEACH
300 South Ferry Street
Terminal Island, CA. 90731

Re: Decision on Application for Further Review of Protest No. 27049 00 4153, concerning the Classification of "Empty Candle Jars."

DEAR SIR:

This decision involves the classification of certain glass containers from Ecuador under the Harmonized Tariff Schedules of the United States (HTSUS).

Facts:

The merchandise was entered in April 1989, as votive candle holders, in subheading 7013.99.3500, HTSUS. Customs changed the classification to the provision for other drinking glasses, valued not over $0.30 each, in subheading 7013.29.10, HTSUS. The glasses are made of colorless glass, and measure about 4 inches in height, with a top of about 3 inches in diameter, and about 2 inches at the bottom. Subsequent to importation the glasses are said to be filled with wax and used as candle holders. A sample was submitted.

Issue:

Whether the subject glasses are classifiable as drinking glasses in subheading 7013.29.10,HTSUS, votive candle holders in subheading 7013.99.35, HTSUS, or other glass containers in subheading 7010.90.50, HTSUS.

Law and Analysis:

The importer contends that the "glass jars" should be classified as containers in subheading 7010.90.50, HTSUS. It is asserted that the Explanatory Notes describe the imports, by stating that heading 7010 covers glass products manufactured by machines which automatically feed molten glass into molds where the finished articles are formed by the action of compressed air. Products covered in subheading 7013 would be processed, it is maintained, according to the Notes by a method of manufacture which produces a "pressed glass."

Merchandise imported into the United States is classified according to its condition as entered. The sample of the imported glass shows it to be a type of drinking glass; nothing in its appearance gives any indication that it is dedicated to any specific use. The fact that it is going to be filled with wax subsequent to importation and used for possible commemorative or religious purposes does not change the classification. While both headings 7010 and 7013 may be considered "use" provisions, it is the principal use, as distinguished from the Actual Use, which controls. The principal use of this class or kind of glass is as a drinking glass. While the Explanatory Notes may describe the type of manufacturing processes used to make the various products covered in the respective provisions, products classified in those provisions are classified by the class or kind of glass products they are, not their method of manufacture.

Holding:

The imported glass product is a drinking glass classifiable in subheading 7013.29.10, HTSUS.

The protest should be denied in full.

A copy of the protest should be furnished the protestant along with the Form 19 Notice of Action.

JOHN DURANT,
Director,
Commercial Rulings Division.

[ATTACHMENT C]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, D.C., August 10, 1992.

CLA–2 CO:R:C:M 951391 EJD
Category: Classification
Tariff No. 7013.29.10

DISTRICT DIRECTOR
U.S. CUSTOMS SERVICE
300 South Ferry Street Room 2017
Terminal Island
San Pedro, California 90731

Re: Internal Advice 14/92; drinking glasses; glass containers; HQ 088123; HQ 950617; HQ 088742; HQ 089054; 7010.90.50; 7013.99.35; 9405.50.40; T.D. 56111 (75) and (98).

DEAR SIR:

This is our response regarding Internal Advice (IA) request 14/92, on behalf of Candle Corporation of America (Candle Corp.), represented by Barnes, Richardson & Colburn, regarding the classification of certain glass containers imported from Ecuador under the Harmonized Tariff Schedule of the United States (HTSUS). Samples were submitted for our examination.

Facts:

The merchandise that is the subject of IA 14/92 is a glass container which is imported into the United States empty and then filled with wax and used as a candle holder. The glass containers are in a tapered cylindrical shape and are approximately inches in height, with a top about 2¾ inches in diameter, and a bottom about 2 inches in diameter. They are made from low quality clear glass which holds 250 cc of wax.

The importer has requested that we reconsider Headquarters Ruling Letter (HQ) 088123. In HQ 088123, dated February 25, 1991, we issued a decision on Protest and Request for Further Review No. 2704–90–04153 concerning the classification of glass containers imported from Ecuador. In this case, Candle Corp. argued that the goods should be classified in subheading 7010.90.50, HTSUS, as other glass containers. In HQ 088123, the containers were held to be classifiable in subheading 7013.29.10, HTSUS, as drinking glasses. Radix Group International, an agent of Candle Corp., was notified on Customs Form 19, dated February 28, 1991, of the denial of the protest and a copy of HQ 088123 was furnished to them.

In HQ 950617, dated November 8, 1991, we issued a decision on the reconsideration of HQ 088123. Barnes, Richardson & Colburn, an agent of Candle Corp., were notified in HQ 950617 of Customs inability to rescind a decision to deny a protest for further review once the decision had been issued to the party in interest.

Issue:

Are the glass containers drinking glasses provided for in subheading 7013.29.10, HTSUS, or containers for conveyance or packing of goods provided for in subheading 7010.90.50, HTSUS?

Law and Analysis:

Merchandise is classifiable under the Harmonized Tariff Schedule of the United States (HTSUS) in accordance with the General Rules of Interpretation (GRIs). GRI 1 states in part that for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes, and provided the headings or notes do not require otherwise, according to GRIs 2 through 6.

Headings 7010 and 7013, HTSUS, are both considered "use" provisions. Additional U.S. Rule of Interpretation 1(a), HTSUS, provides:

> In the absence of special language or context which otherwise requires, a tariff classification controlled by use (other than actual use) is to be determined in accordance with the *use* in the United States *at, or immediately prior to, the date of importation*, of goods of that class or kind to which the imported goods belong, and the *controlling use is the principal use.*" (Emphasis added.)

The two competing headings for these glass containers are the following:

Heading 7010, HTSUS, which provides for "[c]arboys, bottles, flasks, jars, pots, vials, ampoules and other containers, of glass, of a kind used for the conveyance or packing of goods * * *."

Heading 7013, HTSUS, provides for "[g]lassware of a kind used for table, kitchen, toilet, office, indoor decoration or similar purposes (other than that of headings 7010 or 7018)."

The importer contends that this product may be used as a jam or jelly jar with a press-on lid, and therefore, should be classified as a container in heading 7010. They argue that the manufacturing process used to produce this merchandise is common to beer, soda and jam or jelly containers, but not drinking glasses. They claim the belief that the manner in which this merchandise is produced renders it unfit and dangerous to use as a drinking glass because of its flaws such as rough sharp protuberances around the upper lid of container. Furthermore, they claim that the thick lip around the upper edge of the glass container makes it awkward and uneasy for beverage use. Finally, this merchandise is made from low grade glass used to manufacture untempered glass beer and soda bottles, not the higher grade of glass normally used for drinking glasses.

The importer believes that the glass container should be classified under subheading 7010.90.50, HTSUS, which provides for "[c]arboys, bottles, flasks, jars, pots, vials, ampoules and other containers, of glass, of a kind used for the conveyance or packing of goods * * * [o]ther * * * [o]ther containers (with or without their closures)." The importer's counsel points to the Explanatory Notes to heading 7010 which indicate that containers classifiable in heading 7010 are produced by "* * * machines that automatically feed molten glass into moulds * * *. They are usually made of ordinary glass * * *." Since the merchandise in question is produced in this manner, counsel argues that it is classifiable under heading 7010, HTSUS, not heading 7013, HTSUS.

The Explanatory Notes (ENs) of the Harmonized Commodity Description and Coding System (HCDCS) constitute the Customs Cooperation Council's official interpretation of the Harmonized System. They provide a commentary on the scope of each heading of the Harmonized System and are thus useful in ascertaining the classification of merchandise under the system. ENs, although not dispositive, are to be looked to for the proper interpretation of the HTSUS. 54 Fed. Reg. 35127, 35128 (1989).

EN 70.10 states that "[t]his heading covers all glass containers of the kinds commonly used commercially for conveyance or packing of liquids or solid products (powders, granules, etc.)." HCDCS, p.933. EN 70.10 further states that "[t]h[is] heading *does not include:* * * * (c) [d]ecanters, drinking glasses and other glass containers being domestic glassware *(heading 70.13),* but not containers used primarily for the commercial conveyance or packing of goods." HCDCS, p. 934.

It is our position that the glass containers at issue are not the class or kind of merchandise contemplated by this heading. The types of containers found in heading 7010, HTSUS, are solely used to convey a product to the consumer who uses the product in the container and then discards the container.

The shape and the form of this product clearly indicates the principal use of this article (as represented by its imported form) as a drinking glass, not a container. Accordingly, the glass containers are not properly classified under heading 7010, HTSUS.

Contrary to the importer's argument, many products classified under heading 7013, HTSUS, are made from the same "low grade glass" used in the manufacture of the instant merchandise, i.e., cheap drinking glasses. While it is true that many containers classified under heading 7010, HTSUS, are produced in this manner, so are many of the cheaper household glassware items which are classified under heading 7013, HTSUS.

EN 70.13 states that

> [t]his heading covers the following types of articles, most of which are obtained by pressing or blowing in moulds: (1) [t]able or kitchen glassware, e.g. drinking glasses * * *. These articles may be e.g., of ordinary glass, lead crystal, glass having low coefficient of expansion (e.g., borosilicate glass) or of glass ceramics (the latter two in particular, for kitchen glassware) * * *.

HCDCS, p. 936.

It is our position that the importer's arguments are not convincing. In our opinion, the glass container's lip is not very unusual. It is not different from numerous other ordinary, inexpensive, empty drinking glasses provided for in subheading 7013.29, HTSUS.

Subheading 7013.29, HTSUS, provides for

> [g]lassware of a kind used for table, kitchen, toilet, office, indoor decoration or similar purposes (other than that of heading 7010 or 7018) * * * [d]rinking glasses, other than glass-ceramics * * * [o]ther.

In HQ 088123, we stated that "[t]he sample of the imported glass shows it to be a type of drinking glass; nothing in its appearance gives any indication that it is dedicated to any specific use * * *." It is the *principal use*, as distinguished from the actual use, which controls. The *principal use* of this class or kind of glass is as a drinking glass, classifiable under subheading 7013.29.10, HTSUS. Based upon the information provided by the importer, we are not convinced that the *principal use* of this glass will be to convey or pack merchandise.

Holding:

The glass containers are properly classified under subheading 7013.29.10, HTSUS, as "[g]lassware of a kind used for table, kitchen, toilet, office, indoor decoration or similar purposes (other than that of heading 7010 and 7018) * * * [d]rinking glasses, other than of glass-ceramics * * * [o]ther * * * [o]ther * * * [v]alued not over $0.30 each."

You should advise the Internal Advice applicant of this decision.

JOHN DURANT,
Director,
Commercial Rulings Division.

[ATTACHMENT D]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
New York, N.Y., January 28, 1992.

CLA–2–70:S:N:N3D:226 870585
Category: Classification
Tariff No. 7013.29.1000

MR. HOWARD PELTZMAN
VICE PRESIDENT
AQUA-TOUCH INC.
P.O. Box 400
Ellis Mill Road and New Jersey Avenue
Glassboro, N.J. 08028

Re: The tariff classification of a drinking glass from Brazil.

DEAR MR. PELTZMAN:

In your letter dated December 17, 1991, you requested a tariff classification ruling.

A sample was submitted of the product which you intend to import. This item has the form and shape of a small drinking glass. In a telephone conversation with this office, you indicated that the value of the glass is nine or ten cents.

You claim that the product is a "votive candle holder." However, merchandise is classifiable based on its principal use rather than its actual use. Based on its form and shape, this article is classifiable as a drinking glass, not as a votive candle holder.

The applicable subheading for the drinking glass will be 7013.29.1000, Harmonized Tariff Schedule of the United States (HTS), which provides for drinking glasses * * * other: other: valued not over thirty cents each. The rate of duty will be 38 percent ad valorem.

This ruling is being issued under the provisions of Section 177 of the Customs Regulations (19 C.F.R. 177).

A copy of this ruling letter should be attached to the entry documents filed at the time this merchandise is imported. If the documents have been filed without a copy, this ruling should be brought to the attention of the Customs officer handling the transaction.

JEAN F. MAGUIRE,
Area Director,
New York Seaport.

[ATTACHMENT E]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, D.C.

CLA-2 CO:R:C:M 955935 KCC
Category: Classification
Tariff No. 9405.50.40

MR. STEVE LIPTAK
INTER-MARITIME FORWARDING CO., INC.
156 William Street
New York, New York 10028

Re: DD 881552 revoked; glasses; principal use; Additional U.S. Rule of Interpretation 1(a); 7013.29.10; drinking glasses; 7010; other containers used for the conveyance or packing of goods; EN 70.10; HRL 950426; 7013.99.35; votive; HRL 953016; HRL 088123; HRL 953013; HRL 088742; HRL 950245; nonelectrical lamps and lighting fittings; EN 94.05; candlesticks; HRL 089054.

DEAR MR. LIPTAK:

This is in reference to DD 881552 issued to you on January 12, 1993, on behalf of H & H Glass, Inc., which concerned the tariff classification of glasses under the Harmonized Tariff Schedule of the United States (HTSUS).

Facts:

The glasses, item #303 Fifty and item #50 HR GWC Tumbler, at issue in DD 881552 were described as follows:

> They are about 5″ tall and 2¾″ wide. No unit value was advised. The value per unit is believed to not exceed $3. each. Two have a slight taper, the other is straight sided with a slight bulge at mouth and base. They have the appearance of drinking glasses, indeed, one being described as a "tumbler", as noted above. These items are considered, accordingly, to be drinking glasses, affidavits as to end use not withstanding.

Affidavits were provided which stated that, after importation into the U.S., the glasses were filled with candle wax and a wick.

In DD 881552, the District Director, Ogdensburg, New York, held that the glasses were classified under subheading 7013.29.10 or 7013.29.20, HTSUS, which provides for drinking glasses. Classification to the exact eight digit level was dependant upon the value of the glasses.

Issue:

Are the glasses classified as drinking glasses under subheading 7013.29.10, HTSUS, or as other containers used for the conveyance or packing of goods under subheading 7010.90.50, HTSUS, or as votive-candle holders under subheading 7013.99.35, HTSUS, or as non-electrical lamps and lighting fittings under subheading 9405.50.40, HTSUS?

Law and Analysis:

The classification of merchandise under the HTSUS is governed by the General Rules of Interpretation (GRI's). GRI 1, HTSUS, states, in part, that "for legal purposes, classification shall be determined according to the terms of the heading and any relative section or chapter notes * * *." The competing subheadings under consideration are as follows:

7010.90.50	Carboys, bottles, flasks, jars, pots, vials, ampoules and other containers, of glass, of a kind used for the conveyance or packing of goods; preserving jars of glass; stoppers, lids and other closures, of glass * * * Other * * * Other containers (with or without their closures) * * *.
7013	Glassware of a kind used for table, kitchen, toilet, office, indoor decoration or similar purposes (other than that of heading 7010 or 7018) * * *
7013.29.10	Drinking glasses, other than of glass-ceramics * * * Other * * * Other * * * Valued not over $0.30 each.
7013.99.35	Other glassware * * * Other * * * Other * * * Votive-candle holders.
9405.50.40	Lamps and lighting fittings including searchlights and spotlights and parts thereof, not elsewhere specified or included; illuminated signs,

> illuminated nameplates and the like, having a permanently fixed light source, and parts thereof not elsewhere specified or included * * * Non-electrical lamps and lighting fittings * * * Other * * * Other.

Headings 7010 and 7013, HTSUS, are both considered "use" provisions. Additional U.S. Rule of Interpretation 1(a), HTSUS, states that:

> [A] tariff classification controlled by use (other than actual use) is to be determined in accordance with the use in the United States at, or immediately prior to, the date of importation, of goods of that class or kind to which the imported goods belong, and the controlling use is the principal use.

Subheading 7013.29.10, HTSUS, provides for drinking glasses. We are of the opinion that the subject glasses are not of the class or kind of "drinking glasses" classifiable under subheading 7013.29.10, HTSUS. At the time of importation, the physical characteristics of the glasses indicates that they are not principally used as drinking glasses. They have mold seams, knurling, beaded flange finish and embedded manufacturing information. These design features are not the type of features found on drinking glasses. Therefore, the glasses are not properly classified as drinking glasses.

Heading 7010, HTSUS, provides for bottles, vials and other containers of glass which are of a kind used for the conveyance or packing of goods. Explanatory Note (EN) 70.10 of the Harmonized Commodity Description and Coding System (HCDCS) (pg. 933–934), states that heading 7010 "covers all glass containers of the kinds commonly used commercially for the conveyance or packing of liquids or of solid products (powders, granules, etc.)." The types of containers covered by this heading include:

> (A) Carboys, demijohns, bottles (including syphon vases), phials and similar containers, of all shapes and sizes, used as containers for chemical products (acids, etc.), beverages, oils, meat extracts, perfumery preparations, pharmaceutical products, inks, glues, etc.
>
> (B) Jars, pots and similar containers for the conveyance or packing of certain foodstuffs (condiments, sauces, fruit, preserves, honey, etc.), cosmetic or toilet preparations (face creams, hair lotions, etc.), pharmaceutical products (ointments, etc.), polishes, cleaning preparations, etc.
>
> (C) Ampoules, usually obtained from a drawn glass tube, and intended to serve, after sealing, as containers for serums or other pharmaceutical products, or for liquid fuels (e.g., ampoules of petrol for cigarette lighters), chemical products, etc.
>
> (D) Tubular containers and similar containers generally obtained from lamp-worked glass tubes or by blowing, for the conveyance or packing of pharmaceutical products or similar uses.

EN 70.10. The ENs, although not dispositive, are to be looked to for the proper interpretation of the HTSUS. *See.* T.D. 89–80, 54 Fed. Reg. 35127, 35128 (Aug. 23, 1989).

The key phrase in this instance is "commonly used commercially for the conveyance" of products. The root word of "commercially" is commerce which is described as the exchange or buying and selling of commodities. *Webster's Third New International Dictionary* (1986) and *The Random House Dictionary of the English Language* (1983). The root word of "conveyance" is convey which is described as to carry, bring or take from one place to another; transport; bear. *The Random House Dictionary of the English Language* (1983) and *Webster's Third New International Dictionary* (1986).

We are of the opinion that the glasses at issue are not principally used as the class or kind of merchandise contemplated by heading 7010, HTSUS, are used. The types of containers found in heading 7010, HTSUS, are principally used to convey a product to the consumer who uses the product in the container and then discards the container. The glasses at issue are not principally used to commercially convey candle wax. The glasses are necessary for the consumer to use the product, candle wax. In use, the glasses support the candle wax. Additionally, some of the glasses are not merely used as containers to convey the candle wax to the consumer or support the candle wax. They also serve a decorative purpose as they have a design molded into the glass and/or a color lacquer applied to the glass which gives the glasses a decorative feature. As the glasses at issue hold the wax while it is being burned, they are not properly classified under heading 7010, HTSUS. *See,* Headquarters Ruling Letter (HRL) 950426 dated June 19, 1992, which held that glass containers imported into the U.S. empty and then filled with candle wax and a wick were classifiable as votive-candle holders under subheading 7013.99.35, HTSUS, rather than under subheading 7010.90.50, HTSUS.

Subheading 7013.99.35, HTSUS, provides for glass votive-candle holders. We have held that a glass votive-candle holder is a glass holder chiefly used in churches, where the candles are burned for devotional purposes. *See,* HRL 088123 dated February 25, 1991, HRL 088742 dated April 22, 1991, and HRL 950245 dated December 10, 1991. Additionally, we have held that votive-candle holders are generally of two types, large glasses or "sanctuary lamps" which contain candles that burn for about a week and small glasses which hold candles that burn for a few hours. *See,* HRL 950426 dated June 19, 1992.

We are of the opinion that the subject glasses are not principally used as votive-candle holders. There is no evidence to show that these glasses are principally burned for devotional purposes. Therefore, classification under subheading 7013.99.35, HTSUS, is inappropriate.

Subheading 9405.50.40, HTSUS, provides for non-electrical lamps and lighting fittings. EN 94.05 (pg. 1581), states that lamps and light fittings of this group can be composed of any material and use any source of light, including candles. In addition, EN 94.05(I)(6) states that this heading covers "* * * in particular candelabra, candlesticks, and candle brackets."

We are of the opinion that the terms "candlestick", "candlestick holder", and "candleholder" are interchangeable. Candleholder has been defined as a candlestick, *Webster's II New Riverside University Dictionary,* pg. 224 (1st ed. 1984), and as a holder for a candle, candlestick, *The Random House Dictionary of the English Language,* pg. 216 (1st Ed. 1983). Candlestick has been defined as a utensil for supporting a candle, whether elaborately made or in the common form of a saucer with a socket in the center, *Webster's New International Dictionary,* pg. 390 (2d ed. 1939). Reference to lexicographic authorities is proper when determining the meaning of a tariff term. *Hasbro Industries, Inc. v. United States,* 703 F. Supp. 941 (CIT 1988), *aff'd,* 879 F.2d 838 (1989); *C.J. Tower & Sons of Buffalo, Inc. v. United States,* 69 CCPA 128, 673 F.2d 1268 (1982).

We have previously held that empty glass candle holders are classified under subheading 9405.50.40, HTSUS, as non-electrical lamps and light fittings. *See,* HRL 953016 dated April 27, 1993, HRL 088742 dated April 22, 1991, and HRL 089054 dated August 2, 1991, which classified glass candle holders as non-electrical lamps and light fittings under subheading 9405.50.40, HTSUS, pursuant to EN 94.05.

Based on the above definitions and rulings, we find that the glasses are, in fact, candlesticks as the term is used in the ENs. The articles at issue are a utensil used for supporting a candle. They are not elaborate, but are of a simple and, in some of the glasses, decorative form. Therefore, the glasses are properly classified under subheading 9405.50.40, HTSUS, as nonelectrical lamps and light fittings.

Holding:

The 303 Fifty and 50 HR GWC Tumbler glasses are classified under subheading 9405.50.40, HTSUS, as non-electrical lamps and light fittings, which is currently subject to the Column 1 duty rate of 7.6 percent *ad valorem.*

DD 881552 is revoked.

JOHN DURANT,
Director,
Commercial Rulings Division.

[ATTACHMENT F]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, D.C.

CLA–2 CO:R:C:M 956108 KCC
Category: Classification
Tariff No. 9405.50.40

DISTRICT DIRECTOR
U.S. CUSTOMS SERVICE
300 South Ferry Street, Room 2017
Terminal Island, California 90731

Re: HRL 088123 and HRL 951391 revoked; glasses; principal use; Additional U.S. Rule of Interpretation 1(a); 7013.2910; drinking glasses; 7010; other containers used for the conveyance or packing of goods; EN 70.10; HRL 950426; 7013.99.35; votive; HRL 088123; HRL 953016; HRL 088742; HRL 950245; non-electrical lamps and lighting fittings; EN 94.05; candlesticks; HRL 089054.

DEAR DISTRICT DIRECTOR:

This is in reference to Headquarters Ruling Letter (HRL) 088123 dated February 25, 1991 (Protest 2704–89–004153), and HRL 951391 dated August 10, 1992 (Internal Advice 14/92), on behalf of Candle Corporation of America, which concerned the tariff classification of glasses under the Harmonized Tariff Schedule of the United States (HTSUS).

Facts:

The glasses at issue in HRL 088123 and HRL 951391 were the same style of glasses. HRL 951391 best described the glasses as follows:

> * * * is a glass container which is imported into the United States empty and then filled with wax and used as a candle holder. The glass containers are in a tapered cylindrical shape and are approximately 4 inches in height, with a top about 2¾ inches in diameter, and a bottom about 2 inches in diameter. They are made from low quality clear glass which holds 250 cc of wax.

Both HRL 088123 and HRL 951391 classified the glasses under subheading 7013.29.10, HTSUS, as drinking glasses.

Issue:

Are the glasses classified as drinking glasses under subheading 7013.29.10, HTSUS, or as other containers used for the conveyance or packing of goods under subheading 7010.90.50, HTSUS, or as votive-candle holders under subheading 7013.99.35, HTSUS, or as non-electrical lamps and lighting fittings under subheading 9405.50.40, HTSUS?

Law and Analysis:

The classification of merchandise under the HTSUS is governed by the General Rules of Interpretation (GRI's). GRI 1, HTSUS, states, in part, that "for legal purposes, classification shall be determined according to the terms of the heading and any relative section or chapter notes * * *." The competing subheadings under consideration are as follows:

7010.90.50	Carboys, bottles, flasks, jars, pots, vials, ampoules and other containers, of glass, of a kind used for the conveyance or packing of goods; preserving jars of glass; stoppers, lids and other closures, of glass * * * Other * * * Other containers (with or without their closures) * * *.
7013	Glassware of a kind used for table, kitchen, toilet, office, indoor decoration or similar purposes (other than that of heading 7010 or 7018) * * *
7013.29.10	Drinking glasses, other than of glass-ceramics * * * Other * * * Other * * *. Valued not over $0.30 each.
7013.99.35	Other glassware * * * Other * * * Other * * * Votive-candle holders.
9405.50.40	Lamps and lighting fittings including searchlights and spotlights and parts thereof, not elsewhere specified or included; illuminated signs, illuminated nameplates and the like, having a permanently fixed light source, and parts thereof not elsewhere specified or included * * * Non-electrical lamps and lighting fittings * * * Other * * * Other.

Headings 7010 and 7013, HTSUS, are both considered "use" provisions. Additional U.S. Rule of Interpretation 1(a), HTSUS, states that:

> [A] tariff classification controlled by use (other than actual use) is to be determined in accordance with the use in the United States at, or immediately prior to, the date of importation, of goods of that class or kind to which the imported goods belong, and the controlling use is the principal use.

Subheading 7013.29.10, HTSUS, provides for drinking glasses. We are of the opinion that the subject glasses are not of the class or kind of "drinking glasses" classifiable under subheading 7013.29.10, HTSUS. At the time of importation, the physical characteristics of the glasses indicates that they are not principally used as drinking glasses. They have mold seams, knurling, beaded flange finish and embedded manufacturing information. These design features are not the type of features found on drinking glasses. Therefore, the glasses are not properly classified as drinking glasses.

Heading 7010, HTSUS, provides for bottles, vials and other containers of glass which are of a kind used for the conveyance or packing of goods. Explanatory Note (EN) 70.10 of the Harmonized Commodity Description and Coding System (HCDCS) (pg. 933–934), states that heading 7010 "covers all glass containers of the kinds commonly used commercially for the conveyance or packing of liquids or of solid products (powders, granules, etc.)." The types of containers covered by this heading include:

> (A) Carboys, demijohns, bottles (including syphon vases), phials and similar containers, of all shapes and sizes, used as containers for chemical products (acids, etc.), beverages, oils, meat extracts, perfumery preparations, pharmaceutical products, inks, glues, etc.
>
> (B) Jars, pots and similar containers for the conveyance or packing of certain foodstuffs (condiments, sauces, fruit, preserves, honey, etc.), cosmetic or toilet preparations (face creams, hair lotions, etc.), pharmaceutical products (ointments, etc.), polishes, cleaning preparations, etc.
>
> (C) Ampoules, usually obtained from a drawn glass tube, and intended to serve, after sealing, as containers for serums or other pharmaceutical products, or for liquid fuels (e.g., ampoules of petrol for cigarette lighters), chemical products, etc.
>
> (D) Tubular containers and similar containers generally obtained from lamp-worked glass tubes or by blowing, for the conveyance or packing of pharmaceutical products or similar uses.

EN 70.10. The ENs, although not dispositive, are to be looked to for the proper interpretation of the HTSUS. *See,* T.D. 98–80, 54 Fed. Reg. 35127, 35128 (Aug. 23, 1989).

The key phrase in this instance is "commonly used commercially for the conveyance" of products. The root word of "commercially" is commerce which is described as the exchange or buying and selling of commodities. *Webster's Third New International Dictionary* (1986) and *The Random House Dictionary of the English Language* (1983). The root word of "conveyance" is convey which is described as to carry, bring or take from one place to another; transport; bear. *The Random House Dictionary of the English Language* (1983) and *Webster's Third New International Dictionary* (1986).

We are of the opinion that the glasses at issue are not principally used as the class or kind of merchandise contemplated by heading 7010, HTSUS, are used. The types of containers found in heading 7010, HTSUS, are principally used to convey a product to the consumer who uses the product in the container and then discards the container. The glasses at issue are not principally used to commercially convey candle wax. The glasses are necessary for the consumer to use the product, candle wax. In use, the glasses support the candle wax. Additionally, some of the glasses are not merely used as containers to convey the candle wax to the consumer or support the candle wax. As the glasses at issue hold the wax while it is being burned, they are not properly classified under heading 7010, HTSUS. *See,* Headquarters Ruling Letter (HRL) 950426 dated June 19, 1992, which held that glass containers imported into the U.S. empty and then filled with candle wax and a wick were classifiable as votive-candle holders under subheading 7013.99.35, HTSUS, rather than under subheading 7010.90.50, HTSUS.

Subheading 7013.99.35, HTSUS, provides for glass votive-candle holders. We have held that a glass votive-candle holder is a glass holder chiefly used in churches, where the candles are burned for devotional purposes. *See,* HRL 088123 dated February 25, 1991, HRL 088742 dated April 1991, and HRL 950245 dated December 10, 1991. Additionally, we have held that votive-candle holders are generally of two types, large glasses or "sanc-

tuary lamps" which contain candles that burn for about a week and small glasses which hold candles that burn for a few hours. *See,* HRL 950426 dated June 19, 1992.

We are of the opinion that the subject glasses are not principally used as votive-candle holders. There is no evidence to show that these glasses are principally burned for devotional purposes. Therefore, classification under subheading 7013.99.35, HTSUS, is inappropriate.

Subheading 9405.50.40, HTSUS, provides for non-electrical lamps and lighting fittings. EN 94.05 (pg. 1581), states that lamps and light fittings of this group can be composed of any material and use any source of light, including candles. In addition, EN 94.05(I)(6) states that this heading covers "* * * in particular candelabra, candlesticks, and candle brackets."

We are of the opinion that the terms "candlestick", "candlestick holder", and "candle-holder" are interchangeable. Candleholder has been defined as a candlestick, *Webster's II New Riverside University Dictionary,* pg. 224 (1st ed. 1984), and as a holder for a candle; candlestick, *The Random House Dictionary of the English Language,* pg. 216 (1st Ed. 1983). Candlestick has been defined as a utensil for supporting a candle, whether elaborately made or in the common form of a saucer with a socket in the center, *Webster's New International Dictionary,* pg. 390 (2d ed. 1939). Reference to lexicographic authorities is proper when determining the meaning of a tariff term. *Hasbro Industries, Inc. v. United States,* 703 F. Supp. 941 (CIT 1988), *aff'd,* 879 F.2d 838 (1989); *C.J. Tower & Sons of Buffalo, Inc. v. United States,* 69 CCPA 128, 673 F.2d 1268 (1982).

We have previously held that empty glass candle holders are classified under subheading 9405.50.40, HTSUS, as non-electrical lamps and light fittings. *See,* HRL 953016 dated April 27, 1993, HRL 088742 dated April 22, 1991, and HRL 089054 dated August 2, 1991, which classified glass candle holders as non-electrical lamps and light fittings under subheading 9405.50.40, HTSUS, pursuant to EN 94.05.

Based on the above definitions and rulings, we find that the glasses are, in fact, candlesticks as the term is used in the ENs. The articles at issue are a utensil used for supporting a candle. They are not elaborate, but are of a simple and, in some of the glasses, decorative form. Therefore, the glasses are properly classified under subheading 9405.50.40, HTSUS, as nonelectrical lamps and light fittings.

Holding:

The glasses are classified under subheading 9405.50.40, HTSUS, as non-electrical lamps and light fittings, which is currently subject to the Column 1 duty rate of 7.6 percent *ad valorem.*

HRL 088123 and HRL 951391 are revoked. You should advice the Candle Corporation of America, the protestant and Internal Advice applicant, of this decision.

JOHN DURANT,
Director,
Commercial Rulings Division.

[ATTACHMENT G]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, D.C.

CLA–2 CO:R C:M 956083 KCC
Category: Classification
Tariff No. 7013.99.35

MR. HOWARD PELTZMAN
AQUA-TOUCH INC.
P.O. Box 400
Ellis Mill Road and New Jersey Avenue
Glassboro, New Jersey 08028

Re: NY 870585 revoked ; glasses; principal use; Additional U.S. Rule of Interpretation 1(a); 7013.29.10; drinking glasses; 7010; other containers used for the conveyance or packing of goods; EN 70.10; HRL 950426; ; votive; HRL 088123; HRL 088742; HRL 950245.

DEAR MR. PELTZMAN:

This is in reference to New York Ruling (NY) 870585 dated January 28, 1992, which concerned the tariff classification of glasses under the Harmonized Tariff Schedule of the United States (HTSUS).

Facts:

NY 870585 classified the glasses at issue under subheading 7013.20.10, HTSUS, as drinking glasses. Your original submission to Customs in New York dated December 17, 1991, described the glasses as "Votive candle holder. Approximately two and a half inches high, two inches in diameter."

Issue:

Are the glasses classified as drinking glasses under subheading 7013.29.10, HTSUS, or as other containers used for the conveyance or packing of goods under subheading 7010.90.50, HTSUS, or as votive-candle holders under subheading 7013.99.35, HTSUS?

Law and Analysis:

The classification of merchandise under the HTSUS is governed by the General Rules of Interpretation (GRI's). GRI 1, HTSUS, states, in part, that "for legal purposes, classification shall be determined according to the terms of the heading and any, relative section or chapter notes * * *." The competing subheadings under consideration are as follows:

7010.90.50	Carboys, bottles, flasks, jars, pots, vials, ampoules and other containers, of glass, of a kind used for the conveyance or packing of goods; preserving jars of glass; stoppers, lids and other closures, of glass * * * Other * * * Other containers (with or without their closures) * * *.
7013	Glassware of a kind used for table, kitchen, toilet, office, indoor decoration or similar purposes (other than that of heading 7010 or 7018)
7013.29.10	Drinking glasses, other than of glass-ceramics * * * Other * * * Other * * * Valued not over $0.30 each.
7013.99.35	Other glassware * * * Other * * * Other * * * Votive-candle holders.

Headings 7010 and 7013, HTSUS, are both considered "use" provisions. Additional U.S. Rule of Interpretation 1(a), HTSUS, states that:

> [A] tariff classification controlled by use (other than actual use) is to be determined in accordance with the use in the United States at, or immediately prior to, the date of importation, of goods of that class or kind to which the imported goods belong, and the controlling use is the principal use.

Subheading 7013.29.10, HTSUS, provides for drinking glasses. We are of the opinion that the subject glasses are not of the class or kind of "drinking glasses" classifiable under subheading 7013.29.10, HTSUS. At the time of importation, the physical characteristics of the glasses indicates that they are not principally used as drinking glasses. The size and design features are not the type of features found on drinking glasses. Therefore, the glasses are not properly classified as drinking glasses.

Heading 7010, HTSUS, provides for bottles, vials and other containers of glass which are of a kind used for the conveyance or packing of goods. Explanatory Note (EN) 70.10 of

the Harmonized Commodity Description and Coding System (HCDCS) (pg. 933–934), states that heading 7010 "covers all glass containers of the kinds commonly used commercially for the conveyance or packing of liquids or of solid products (powders, granules, etc.)." The types of containers covered by this heading include:

> (A) Carboys, demijohns, bottles (including syphon vases), phials and similar containers, of all shapes and sizes, used as containers for chemical products (acids, etc.), beverages, oils, meat extracts, perfumery preparations, pharmaceutical products, inks, glues, etc.
>
> (B) Jars, pots and similar containers for the conveyance or packing of certain foodstuffs (condiments, sauces, fruit, preserves, honey, etc.), cosmetic or toilet preparations (face creams, hair lotions, etc.), pharmaceutical products (ointments, etc.), polishes, cleaning preparations, etc.
>
> (C) Ampoules, usually obtained from a drawn glass tube, and intended to serve, after sealing, as containers for serums or other pharmaceutical products, or for liquid fuels (e.g., ampoules of petrol for cigarette lighters), chemical products, etc.
>
> (D) Tubular containers and similar containers generally obtained from lamp-worked glass tubes or by blowing, for the conveyance or packing of pharmaceutical products or similar uses.

EN 70.10. The ENs, although not dispositive, are to be looked to for the proper interpretation of the HTSUS. *See,* T.D. 89–80, 54 Fed. Reg. 35127, 35128 (Aug. 23, 1989).

The key phrase in this instance is "commonly used commercially for the conveyance" of products. The root word of "commercially" is commerce which is described as the exchange or buying and selling of commodities. *Webster's Third New International Dictionary* (1986) and *The Random House Dictionary of the English Language* (1983). The root word of "conveyance" is convey which is described as to carry, bring or take from one place to another; transport; bear. *The Random House Dictionary of the English Language* (1983) and *Webster's Third New International Dictionary* (1986).

We are of the opinion that the glasses at issue are not principally used as the class or kind of merchandise contemplated by heading 7010, HTSUS, are used. The types of containers found in heading 7010, HTSUS, are principally used to convey a product to the consumer who uses the product in the container and then discards the container. The glasses at issue are not principally used to commercially convey candle wax. The glasses are necessary for the consumer to use the product, candle wax. In use, the glasses support the candle wax. Additionally, some of the glasses are not merely used as containers to convey the candle wax to the consumer or support the candle wax. As the glasses at issue hold the wax while it is being burned, they are not properly classified under heading 7010, HTSUS. *See,* Headquarters Ruling Letter (HRL) 950426 dated June 19, 1992, which held that glass containers imported into the U.S. empty and then filled with candle wax and a wick were classifiable as votive-candle holders under subheading 7013.99.35, HTSUS, rather than under subheading 7010.90.50, HTSUS.

Subheading 7013.99.35, HTSUS, provides for glass votive-candle holders. We have held that a glass votive-candle holder is a glass holder chiefly used in churches, where the candles are burned for devotional purposes. *See,* HRL 088123 dated February 25, 1991, HRL 088742 dated April 22, 1991, and HRL 950245 dated December 10, 1991. Additionally, we have held that votive-candle holders are generally of two types, large glasses or "sanctuary lamps" which contain candles that burn for about a week and small glasses which hold candles that burn for a few hours. *See,* HRL 950426 dated June 19, 1992.

We are of the opinion that the subject glasses are principally used as votive-candle holders. The size of the glasses, *i.e.,* two and a half inches tall and two inches in diameter, is indicative of the common votive-candle holder used in churches and homes for devotional purposes. Therefore, the glasses are properly classified under subheading 7013.99.35, HTSUS.

Holding:

The glasses are classified under subheading 7013.99.35, HTSUS, as glass votive-candle holders, which is currently subject to the Column 1 duty rate of 6.6 percent *ad valorem.*

NY 870585 is revoked.

JOHN DURANT,
Director,
Commercial Rulings Division.

U.S. Customs Service

Proposed Rulemakings

19 CFR Part 12

IMPORTER CERTIFICATION REGARDING COUNTRY OF ORIGIN OF TEXTILES AND TEXTILE PRODUCTS

RIN 1515–AB43

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: This document proposes to amend the Customs Regulations to require that an importer of textiles or textile products submit to Customs a certification stating that he has used reasonable care to ascertain the true country of origin of the imported merchandise and to verify the accuracy of the declaration prepared by the manufacturer, producer or exporter and filed by the importer with the entry. This proposed change is intended to enhance the enforcement of quota limits and visa and other requirements under the U.S. textile import program.

DATES: Comments must be received on or before May 31, 1994.

ADDRESSES: Written comments (preferably in triplicate) may be addressed to the Regulations Branch, U.S. Customs Service, Franklin Court, 1301 Constitution Avenue, N.W., Washington, D.C. 20229. Comments submitted may be inspected at the Regulations Branch, Office of Regulations and Rulings, Franklin Court, 1099 14th Street, N.W., Suite 4000, Washington, D.C.

FOR FURTHER INFORMATION CONTACT: Dick Crichton, Office of Trade Operations (202–927–0162).

SUPPLEMENTARY INFORMATION:

BACKGROUND

Customs continues to encounter significant compliance and enforcement problems with regard to the importation and entry of textiles and textile products that are subject to the provisions of section 204 of the Agricultural Act of 1956, as amended (7 U.S.C. 1854). Identification of the true country of origin of imported textiles and textile products is necessary to ensure compliance with quota restrictions and visa

requirements or other requirements (for example, country of origin marking) under the U.S. textile import program and other laws or programs administered by Customs.

Merchandise that is the product of a country to which restraint levels (quotas) or textile visa requirements apply may be entered, or attempted to be entered, with a false declaration of country of origin. The false claim that the merchandise is the product of a country other than the actual country of production may result in the entered merchandise not being subjected to any quota level or being subjected to a more lenient quota or visa requirement. The entry of textiles and textile products into the commerce of the United States under such circumstances violates the bilateral and multilateral textile agreements to which the United States is a party and causes significant injury to domestic producers of textiles and textile products, thereby compromising orderly international trade in textiles and textile products which is the purpose behind the U.S. textile import program.

Section 12.130 of the Customs Regulations (19 CFR 12.130) was promulgated to set forth rules for determining, and providing documentary evidence of, the country of origin of imported textiles and textile products. Paragraph (f) of that section concerns documentary evidence of origin and provides (1) that all importations of textiles and textile products subject to section 204 of the Agricultural Act of 1956 shall be accompanied by the declaration(s) set forth in paragraph (f)(1) (single country declaration, for merchandise whose origin is attributable to only one country) or (f)(2) (multiple country declaration, for merchandise whose origin is attributable to more than one country) and (2) that all importations of textiles and textile products not subject to section 204 shall be accompanied by the declaration set forth in paragraph (f)(3) (negative declaration, with reference to the applicability of section 204). Paragraph (f) further provides that the required declaration(s) shall be filed with the entry and may be prepared by the manufacturer, producer, exporter or importer of the merchandise.

It is recognized that, under the terms of § 12.130(f), there may be instances in which the importer is not the party who prepares a declaration required to be submitted under that section. However, Customs does not believe that in such instances the importer should be totally absolved from responsibility regarding the accuracy of the declaration, particularly in view of the fact that under § 12.130(f) it is the responsibility of the importer to file the declaration with Customs as a condition of entry of the textiles or textile products. In other words, because it is the importer and not the manufacturer, producer or exporter who has both the greatest commercial interest in the import transaction and the ultimate legal responsibility as regards the propriety of the import transaction as a whole, including the correctness of the documentation submitted to Customs in connection therewith, the importer should not be allowed to submit a declaration to Customs on blind faith as to its accuracy, and without running the risk of incurring a penalty for doing

so, merely for the reason that the declaration was prepared by another party. To conclude otherwise would result in an impermissible loophole in the administration and enforcement of the U.S. textile import program. On the other hand, Customs also recognizes that where a § 12.130(f) declaration is prepared by a manufacturer, producer or exporter, the importer may not always be privy to the facts necessary to verify with absolute certainty either the true country of origin of the imported merchandise or the specific information set forth on the declaration. In such circumstances it would be unreasonable to hold the importer to an absolute verification standard.

Customs believes that the Customs Regulations should clearly reflect the principles outlined in the preceding paragraph, striking an appropriate balance between the basic legal responsibility and liability of the importer and what the importer can reasonably be expected to accomplish in carrying out that responsibility. Customs further believes that the "informed compliance" principle underlying certain Customs Modernization provisions of the North American Free Trade Agreement Implementation Act (Title VI of Public Law 103–182, 107 Stat. 2057, 2170), coupled with the "reasonable care" standard in discharging an importer's responsibilities under 19 U.S.C. 1484 as amended by section 637 of that Act, provide appropriate guidance for striking such a balance. In House Report No. 103–361, the Committee on Ways and Means discussed the principles of "informed compliance" and "reasonable care" in part as follows (at pages 120–121):

> In the view of the Committee, for "informed compliance" to work, it is essential that the importing community and the Customs Service share responsibility in seeing that, at a minimum, "reasonable care" is used in discharging those activities for which the importer has responsibility. These include, but are not limited to: furnishing of information sufficient to permit Customs to fix the final classification and appraisal of merchandise; taking measures that will lead to and assure the preparation of accurate documentation and providing sufficient pricing and financial information to permit proper valuation of merchandise.
>
> * * * * * * *
>
> To the extent that an importer fails to use reasonable care in classifying and valuing the merchandise and presenting other entry data, the Customs Service may impose a penalty under the appropriate culpability level of 19 U.S.C. 1592. * * *

Accordingly, based on the above, Customs in this document is proposing to amend § 12.130(f) by the addition of a new paragraph (f)(4) to provide for the submission by the importer of a statement certifying that the importer has used reasonable care to ascertain the true country of origin of the imported textiles or textile products and to verify the accuracy of each declaration required to be submitted under paragraphs (f)(1)–(3). The certification would only be required when a declaration was prepared by a party other than the importer and could be either included on, or attached to, the declaration to which it relates.

COMMENTS

Before adopting the proposed amendment as a final rule, consideration will be given to any written comments (preferably in triplicate) timely submitted to Customs. Comments submitted will be available for public inspection in accordance with the Freedom of Information Act (5 U.S.C. 552), § 1.4, Treasury Department Regulations (31 CFR 1.4), and § 103.11(b), Customs Regulations (19 CFR 103.11(b)), on regular business days between the hours of 9 a.m. and 4:30 p.m. at the Regulations Branch, Office of Regulations and Rulings, Franklin Court, 1099 14th Street, N.W., Suite 4000, Washington, D.C.

EXECUTIVE ORDER 12866

This document does not meet the criteria for a "significant regulatory action" as specified in Executive Order 12866.

REGULATORY FLEXIBILITY ACT

Pursuant to the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), it is certified that, if adopted, the proposed amendment will not have a significant economic impact on a substantial number of small entities. The amendment involves only a short certification as a necessary adjunct to the existing legal responsibility of importers regarding the submission of correct documentation to Customs. Accordingly, the proposed amendments are not subject to the regulatory analysis or other requirements of 5 U.S.C. 603 and 604.

LIST OF SUBJECTS IN 19 CFR PART 12

Customs duties and inspection, Entry procedures, Imports, Textiles and textile products.

PROPOSED AMENDMENT TO THE REGULATIONS

For the reasons set forth above, it is proposed to amend Part 12, Customs Regulations (19 CFR Part 12), as set forth below.

PART 12—SPECIAL CLASSES OF MERCHANDISE

1. The authority citation for Part 12 continues to read in part as follows:

Authority: 5 U.S.C. 301, 19 U.S.C. 66, 1202 (General Note 17, Harmonized Tariff Schedule of the United States (HTSUS)), 1624;

* * * * * * *

2. Section 12.130 is amended by adding paragraph (f)(4) to read as follows:

§ 12.130 Textiles and textile products country of origin.

* * * * * * *

(f) * * *

(4) *Importer certification.* If any declaration required under paragraph (f) of this section was prepared by the manufacturer, producer or exporter of the textiles or textile products and not by the importer

thereof, the importer shall include on, or as an attachment to, each such declaration the following statement:

I certify that I have used reasonable care to ascertain the true country of origin of the articles covered by the (above) (attached) declaration and that I have used reasonable care in verifying the accuracy of the other information set forth on that declaration.

Date_____
Name_____
Signature_____
Title_____
Company_____
Address_____

SAMUEL H. BANKS,
Acting Commissioner of Customs.

Approved: March 21, 1994.
JOHN P. SIMPSON,
Deputy Assistant Secretary of the Treasury.

[Published in the Federal Register, March 30, 1994 (59 FR 14806)]

---

19 CFR Part 141

ESTABLISHMENT OF CONDITIONAL RELEASE PERIOD FOR TEXTILES AND TEXTILE PRODUCTS

RIN 1515–AB39

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: This document proposes to amend the Customs Regulations to establish a conditional release period of 180 days on all entries of textiles and textile products. This proposed amendment will permit Customs to issue notices of redelivery to importers of textiles or textile products up to 30 days after the end of the conditional release period if investigation or information reveals that the merchandise was imported in violation of visa or quota restrictions or other requirements of law. Failure to comply with a notice of redelivery will render the importer liable for liquidated damages under the terms of the basic importation bond.

DATES: Comments must be received on or before May 31, 1994.

ADDRESSES: Written comments (preferably in triplicate) may be addressed to the Regulations Branch, U.S. Customs Service, Franklin

Court, 1301 Constitution Avenue, N.W., Washington, D.C. 20229. Comments submitted may be inspected at the Regulations Branch, Office of Regulations and Rulings, Franklin Court, 1099 14th Street, N.W., Suite 4000, Washington, D.C.

FOR FURTHER INFORMATION CONTACT: Jeremy Baskin, Penalties Branch, Office of Regulations and Rulings (202–482–6950).

SUPPLEMENTARY INFORMATION:

BACKGROUND

Customs has encountered a significant enforcement problem with regard to textiles and textile products that are subject to the provisions of section 204, Agricultural Act of 1956, as amended (7 U.S.C. 1854), and that are imported into the United States in violation of quota restrictions or without the appropriate visa from the country of origin. This problem involves merchandise that is the product of a country to which stringent quotas or visa requirements apply and that is transshipped through a second country having less rigorous quota and visa standards. Such transshipment operations are often performed in order to facilitate the making of a false claim, upon importation into the United States, that the merchandise is a product of the country through which it was transshipped and therefore subject to the more lenient quota and visa entry standards applicable to products of that country. Discovery of these violations often occurs only after a significant investigative effort that has been concluded well after the time of entry and release of the offending merchandise into the commerce of the United States.

While the penalty provisions of section 592 of the Tariff Act of 1930, as amended (19 U.S.C. 1592), are in principle available for assessment against any party who has committed fraud, gross negligence or negligence in connection with the entry of such transshipped merchandise, it is not always possible to establish the requisite culpability. The fact that section 592 penalties may not be successfully assessed in each case involving transshipped merchandise does not alter the fact that the entry of such merchandise into the commerce of the United States in violation of visa and quota requirements causes significant harm to domestic industry.

When penalty liability cannot be readily assessed or quantified, claims for liquidated damages may be available to compensate for the harm done. Under condition (d) of the Basic Importation and Entry Bond, set forth in § 113.62(d) of the Customs Regulations (19 CFR 113.62(d)), the importer agrees to redeliver timely, on demand by Customs, any merchandise which has been conditionally released from Customs custody if it fails to comply with the laws or regulations governing admission into the United States. Under the last sentence of that regulatory provision, any demand for redelivery must be made no later than 30 days after the date that the merchandise was released or 30 days after the end of the conditional release period (whichever is later). In C.S.D. 86–21, Customs noted that the end of the conditional release period

refers to a set time limitation established by regulation, *e.g.*, the 180-day period established with regard to Federal motor vehicle safety standards in § 12.80(e)(2) of the Customs Regulations (19 CFR 12.80(e)(2)).

Textiles and textile products which exceed quota limits or do not conform to visa requirements clearly are not entitled to admission into the United States. However, inasmuch as no specific, different conditional release period is provided for by regulation with regard to such merchandise, under § 113.62(d) Customs may issue a Notice of Redelivery only within 30 days after release of the merchandise. In view of the lengthy time required to detect violations relating to transshipment, Customs often is unable to issue a timely Notice of Redelivery and thus is foreclosed from assessing liquidated damages for failure to redeliver the merchandise to Customs custody.

In order to address the problems discussed above, Customs proposes in this document to amend § 141.113 of the Customs Regulations (19 CFR 141.113) by adding a new paragraph (b) to provide for a specific conditional release period of 180 days from the date of release for all textiles and textile products subject to section 204 of the Agricultural Act of 1956. Under § 113.62(d), Customs would then have up to 30 days from the end of the conditional release period to issue a Notice of Redelivery. Failure to redeliver merchandise within the time period specified in the Notice of Redelivery (generally 30 days from the date of the Notice) will result in the assessment of a claim for liquidated damages under the Basic Importation and Entry Bond as provided in § 113.62(k) of the regulations. In addition, as a consequence of the addition of this new paragraph (b) to § 141.113, this document also proposes to redesignate present paragraphs (b)–(g) as (c)–(h) and to add within present paragraph (b) (redesignated as (c)) a cross-reference to new paragraph (b) to accompany the existing cross-reference to paragraph (a).

COMMENTS

Before adopting the proposed amendments as a final rule, consideration will be given to any written comments (preferably in triplicate) timely submitted to Customs. Comments submitted will be available for public inspection in accordance with the Freedom of Information Act (5 U.S.C. 552), § 1.4, Treasury Department Regulations (31 CFR 1.4), and § 103.11(b), Customs Regulations (19 CFR 103.11(b)), on regular business days between the hours of 9 a.m. and 4:30 p.m. at the Regulations Branch, Office of Regulations and Rulings, Franklin Court, 1099 14th Street, N.W., Suite 4000, Washington, D.C.

EXECUTIVE ORDER 12866

This document does not meet the criteria for a "significant regulatory action" as specified in Executive Order 12866.

REGULATORY FLEXIBILITY ACT

Pursuant to the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), it is certified that, if adopted, the proposed amendments will

not have a significant economic impact on a substantial number of small entities. Establishment of a conditional release period for textiles and textile products, which is necessary for law enforcement purposes, will affect only the relatively small percentage of importers who import such merchandise contrary to law. Accordingly, the proposed amendments are not subject to the regulatory analysis or other requirements of 5 U.S.C. 603 and 604.

LIST OF SUBJECTS IN 19 CFR PART 141

Bonds, Customs duties and inspection, Entry procedures, Imports, Release of merchandise.

PROPOSED AMENDMENTS TO THE REGULATIONS

Accordingly, for the reasons set forth above, it is proposed to amend Part 141, Customs Regulations (19 CFR Part 141), as set forth below.

PART 141—ENTRY OF MERCHANDISE

1. The authority citation for Part 141 continues to read in part as follows:

Authority: 19 U.S.C. 66, 1448, 1484, 1624.

* * * * * * *

Section 141.113 also issued under 19 U.S.C. 1499, 1623.

2. Section 141.113 is amended by redesignating paragraphs (b) through (g) as (c) through (h), by adding the words "or (b)" after the words "paragraph (a)" in newly designated paragraph (c), and by adding a new paragraph (b) to read as follows:

§ 141.113 Recall of merchandise released from Customs custody.

* * * * * * *

(b) *Textiles and textile products.* For purposes of determining the admissibility of textiles and textile products subject to the provisions of § 12.130 of this chapter, the release from Customs custody of any such textile or textile product shall be deemed conditional during the 180-day period following the date of release. If the district director finds during the conditional release period that a textile or textile product is not entitled to admission into the commerce of the United States based on quota restrictions or the absence of a correct visa or for any other reason, he shall promptly demand its return to Customs custody.

* * * * * * *

SAMUEL H. BANKS,
Acting Commissioner of Customs.

Approved: March 18, 1994.
JOHN P. SIMPSON,
Deputy Assistant Secretary of the Treasury.

[Published in the Federal Register, March 30, 1994 (59 FR 14808)]

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Dominick L. DiCarlo

Judges

Gregory W. Carman
Jane A. Restani
Thomas J. Aquilino, Jr.
Nicholas Tsoucalas
R. Kenton Musgrave
Richard W. Goldberg

Senior Judges

James L. Watson

Herbert N. Maletz

Bernard Newman

Samuel M. Rosenstein

Clerk

Joseph E. Lombardi

Decisions of the United States Court of International Trade

(Slip Op. 94–50)

LONZA, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 90–03–00143

[Judgment for defendant.]

(Dated March 25, 1994)

Galvin & Mlawski (Jack D. Mlawski, John J. Galvin), for plaintiff.
Frank W. Hunger, Assistant Attorney General; *Joseph I. Liebman,* Attorney-in-Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, United States Department of Justice *(Bruce N. Stratvert),* for defendant.

OPINION

GOLDBERG, *Judge:* This matter is before the court following trial *de novo.* Plaintiff, Lonza, Inc. ("Lonza"), challenges the decision of the United States Customs Service ("Customs") to classify imports of ADC-6,[1] an acyclic organic compound, as other oxygen-function amino-compounds under subheading 2922.50.50 of the Harmonized Tariff Schedule of the United States ("HTS").[2] Lonza argues that although ADC-6 is described by this subheading, ADC-6 is more properly classified under subheading 2941.90.50, HTS, as other antibiotics.[3] Lonza notes that if its merchandise is classifiable under two competing headings within this chapter, the heading that is last in numerical order prevails. HTS, Section VI, Chapter 29, Note 3. The government urges that ADC-6 is not susceptible to dual classification, and that therefore Customs' classification should be affirmed.

Lonza's claim for classification of ADC-6 under subheading 2941.90.50 is predicated upon application of a broad definition of the tariff term "drugs" that has developed over the past seventy years. This definition finds most recent expression in the predecessor to the HTS, the Tariff Schedules of the United States ("TSUS"). The issues before

[1] The subject imported merchandise consists of (2S,3R)-(+)-2-(1S)-Hydroxyethyl-3-Amino-1,5-Pentane-Dioic Acid-5-Methylester, also known as ADC-6.

[2] Oxygen-function amino-compounds that are classified under subheading 2922.50.50, HTS (1989), are dutiable at the rate of 7.9% *ad valorem.*

[3] Antibiotics that are classified under subheading 2941.90.50, HTS (1989), are dutiable at the rate of 3.7% *ad valorem.*

the court, then, are: (1) whether and to what extent this definition has survived enactment of the HTS; (2) if it does remain applicable, whether this definition impacts the classification of antibiotics under the HTS; and (3) if it does apply to the classification of antibiotics under the HTS, whether ADC-6 meets this definition. Because the court finds that the TSUS definition of "drugs" does not apply to the classification of antibiotics under the HTS, Customs' classification of ADC-6 is affirmed.

BACKGROUND

The subject merchandise was entered into the United States at JFK International Airport on April 2, 1989. Customs liquidated the entry on July 21, 1989, and Lonza filed its protest on September 27, 1989. Customs denied this protest on March 16, 1990, and Lonza commenced this action contesting that denial on March 22, 1990. All liquidated duties have been paid. The court exercises its jurisdiction pursuant to 28 U.S.C. § 1581(a).

The following evidence was presented at trial. ADC-6 is used by Merck & Company, Inc. ("Merck") in the domestic production of Imipenem, a member of the beta-lactam family of antibiotics. The term "beta-lactam antibiotics" is a general descriptor of a family of related analogs which includes, *inter alia,* penicillins, cephalosporins, carbapenems, penems, and monobactams. Lactams are defined as organic chemical compounds formed by the intra-molecular dehydrative cyclization of a carboxylic acid and an amine. In the case of ADC-6, the amino and carboxylic acid termini are joined by the elimination of one molecule of water, to form a four-membered lactam ring. Betalactams are four-membered ring lactams which are so named because the amino group involved in forming the cycle is located on a carbon atom "beta" to the carboxylic acid. All currently marketed beta-lactam antibiotics contain the four-membered betalactam ring.

Scientific research indicates that the beta-lactam ring is responsible for the ability of beta-lactam antibiotics to kill bacteria. As a result, the beta-lactam ring is also referred to as the killing site. Beta-lactam antibiotics bind themselves to the cell walls of bacteria, operating to inhibit cell-wall synthesis and thus killing the bacteria. While five- and six-membered lactams are quite stable, four-membered ring betalactams are susceptible to opening of the ring by hydrolysis. When the four-membered beta-lactam ring is broken by hydrolyzing the amide bond, the ability of all beta-lactam antibiotics to kill bacteria is destroyed.

Imipenem is a member of the carbapenem class of antibiotics, and is heterocyclic in chemical structure. Originally, Imipenem was derived from thienamycin. In commercial production, however, Imipenem is synthesized from ADC-6; thienamycin does not exist at any point in this synthesis. In contrast to thienamycin, which is produced naturally by microorganisms, ADC-6 is produced synthetically.

Imipenem also contains a hydroxyethyl side-chain, in addition to its four-membered ring. The purpose of this sidechain is twofold. First, the side-chain contains a recognition element that enables the anti-

biotic to identify target bacteria. Second, the side-chain protects the antibiotic from betalactameses. Target bacteria defend against an antibiotic by producing enzymes, called beta-lactameses; these enzymes are capable of hydrolyzing the amide bond, thereby cleaving the four-membered beta-lactam ring and thus rendering the antibiotic ineffective. Imipenem's side-chain protects against hydrolysis by these bacterial enzymes.

Merck uses Imipenem in the production of PRIMAXIN®, a potent broad spectrum antibacterial agent intended for intravenous administration. Imipenem itself cannot be administered to patients because it is destroyed by the body's enzymes, and because it exhibits kidney toxicity. As a result, PRIMAXIN® is formulated from a combination of three elements: the antibiotic Imipenem; an inhibitor to protect the antibiotic against destruction by enzymes; and a buffer to protect against kidney toxicity. Imipenem by itself has never been approved for use as a medicine.

Synthesis of Imipenem is a multi-step process during which ADC-6 undergoes various chemical reactions. The structural elements of Imipenem that are contributed by ADC-6 include the four-membered beta-lactam ring as well as the hydroxyethyl sidechain. In fact, ADC-6 contributes every atom used to form each of these components. Imipenem thus retains the ADC-6 "moiety" or major portion of the ADC-6 molecule. Removal of the ADC-6 moiety from Imipenem would yield a simple unsaturated carboxylic acid; this acid would lack a beta-lactam ring and would be devoid of the ability to kill or inhibit the growth of bacteria. As a result, Lonza concludes that ADC-6 imparts therapeutic properties to the antibiotic Imipenem. Lonza also argues that ADC-6, a chemical intermediate used in the production of Imipenem, is properly considered an ingredient used in the production of a medicine.

DISCUSSION

Prior to enactment of the HTS, imported chemical compounds that: (1) possessed therapeutic properties; and, (2) were chiefly used as ingredients in medicines, merited classification as drugs. Lonza argues that this definition continues to apply under Chapter 29 of the HTS. Before addressing this issue, the court will first examine the evolution of the definition of the tariff term "drugs."

A. *Historical Evolution of the Tariff Term "Drugs":*

The Customs Simplification Act of 1954 directed the Tariff Commission to compile a revision of customs laws classifying imports for tariff purposes. The Commission submitted the *Tariff Classification Study* to Congress and the President on November 15, 1960; a supplemental report was submitted in January, 1962. The Commission's report, as

amended, became the Tariff Classification Act of 1962. This act implemented the TSUS, which took effect on August 31, 1963.[4]

The Explanatory Notes to Schedule 4, Part 1 of the *Tariff Classification Study state:*

> Paragraph 28(a) provides, among other products, for certain products "suitable for medicinal use" and for "medicinals". In the proposed schedules, the former are provided for in items 407.02 through 407.12; and the latter are provided for under the term "drugs" in items 407.20 through 407.90. The term "drugs" is defined in part 3, headnote 2, and its use in part 1 in lieu of the term "medicinals" is for uniformity of concept which would also provide clarification. Although some question was raised at the hearings in connection with this change of terminology, it is believed that no significant change in coverage or rate is involved.[5]

Thus, the drafters of the Tariff Classification Act of 1962 recognized a distinction between drugs and medicinal preparations. The explanatory notes to the Commission's study further state:

> Headnotes 2 through 5, inclusive, define the terms "pesticides", "plastics materials", "plasticizers", and "drugs", *in the light of prevailing customs practice as well as usage in the industry.*

Tariff Classification Study, Schedule 4, Part 1, at 21 (emphasis added). As enacted, Schedule 4, Part 1, subpart C, Headnote 5, TSUS (1963), contained the following definition:

> The term *"drugs"* in this subpart means those substances having therapeutic or medicinal properties and chiefly used as medicines or as ingredients in medicines.

This definition remained unchanged throughout the entire controlling period of the TSUS.[6]

---

[4] A definition of the tariff term "drugs" can be traced even further, to paragraph 34 of the Tariff Act of 1922. *United States v. Wm. Cooper & Nephews, Inc.*, 22 CCPA 31, 36, T.D. 47038 (1934) (citing Tariff Commission, *Summary of Tariff Information* 91 (1921)). This definition was retained in paragraph 34 of the Tariff Act of 1930, which stated that "the term 'drug' wherever used in this Act shall include only those substances having therapeutic or medicinal properties and chiefly used for medicinal purposes * * *." *Id.* at 35 (emphasis omitted).

In *Synthetic Patents Co. v. United States*, 11 Cust. Ct. 98, 104, C.D. 803 (1943), the court offered the following distinction: "drugs" were substances useful for medicinal purposes, while "medicinal preparations" were products possessing therapeutic properties that were in ready condition for medicinal use. *Id.*

The Customs Court revisited the distinction between drugs and medicinal preparations under the Tariff Act of 1930 in *Synthetic Patents Co. v. United States*, 12 Cust. Ct. 148, 152, C.D. 845 (1944). The court held that a substance possessing therapeutic properties, which were enhanced upon conversion into a medicinal preparation, was properly classified as a drug. Because the subject merchandise required a chemical change to achieve practical medicinal value, the court determined it was ineligible for classification as a medicinal preparation. *Id.*

This distinction was further refined in *Biddle Sawyer Corp. v. United States*, 50 CCPA 85, 320 F.2d 416 (1963). The *Biddle* court determined that in order to be properly classifiable as a medicinal preparation, imported merchandise must possess "curative or alleviative properties in and of itself." *Biddle*, 50 CCPA at 94. The court concluded that the subject merchandise did not possess therapeutic properties because it did not independently act as a curative. And, because the imported merchandise did not induce a desired physiological effect, the court determined that it was not eligible for classification as a medicinal preparation. It appears that appellant-importer did not argue, and the *Biddle* court did not consider, whether, by imparting properties that enhanced the effectiveness of a medicinal preparation, the subject merchandise exhibited therapeutic properties such that it merited tariff treatment as a drug.

[5] The immediate predecessor to Lonza's preferred classification provision, HTS subheading 2941.90.50, is Item 411.76, TSUS (1987), which covered "Drugs: Other: Anti-infective Agents: Antibiotics: Other." Item 411.76, TSUS, was created pursuant to Presidential Proclamation No. 4768 of June 28, 1980. 45 Fed. Reg. 45,135, 45,171 (July 2, 1980). Item 411.76 superseded Item 407.85, TSUS (1963), the originally enacted provision that covered "Drugs: Other."

[6] The TSUS governed U.S. duty rates from August 31, 1963 through December 31, 1988. There were eighteen editions of the TSUS. While the specific numbering of the definition of "drugs" among the headnotes in Schedule 4, Part 1, subpart C, changed over the years, the language employed remained intact. *Compare* Schedule 4, Part 1, subpart C, Headnote 5, TSUS (1963) *with* Schedule 4, Part 1, subpart C, Headnote 9, TSUS (1987).

In response to a request by the President dated August 24, 1981, the U.S. International Trade Commission ("ITC") initiated an investigation in order to prepare a conversion of the TSUS into the nomenclature of the Harmonized System. The ITC submitted its initial report in June 1983.[7] Annex I to this report contained the proposed Converted U.S. Tariff Schedule. The definition of "drugs" was now placed in Chapter 29, Additional U.S. Legal Note 1(c), which stated:

> The term *"drugs"* means compounds having anesthetic, prophylactic, or therapeutic properties and principally used as an active ingredient in a medicament.

Other than changing focus from "substances" to "compounds," and broadening the reference to include anesthetic and prophylactic compounds, this definition retains the two substantive elements found in the TSUS definition. Significantly, however, the proposed tariff schedule no longer designated "antibiotics" as a subset of the broader heading "drugs." Instead, Chapter 29 introduced the term "antibiotics" as an independent heading within the subchapter covering "Other Organic Compounds."[8]

The Trade Policy Staff Committee of the Office of the U.S.Trade Representative reviewed the ITC's 1983 draft proposal; this review resulted in publication of a second edition proposal in September 1984.[9] Notably, the Chapter 29 Notes in this second edition omitted the revised definition of "drugs" that was contained in the ITC's 1983 draft proposal. The Office of the U.S. Trade Representative published a third edition in October 1986, and a final proposed tariff schedule in July 1987. Neither of these drafts incorporated any definition of the term "drugs."[10]

The HTS, enacted as part of the Omnibus Trade and Competitiveness Act of 1988,[11] took effect on January 1, 1989.[12] In contrast to the TSUS, the HTS did not designate "antibiotics" as a subheading of the broader term "drugs." Rather, the term "antibiotics" was designated an inde-

---

[7] *Conversion of the Tariff Schedules of the United States Annotated into the Nomenclature Structure of the Harmonized System: Report on Investigation No. 332–131 Under Section 332 of the Tariff Act of 1930,* USITC Publication No. 1400 (June 1983) *("1983 ITC Conversion Report").*

[8] The TSUS classified "other antibiotics" under Item 411.76. Annex II to the ITC's 1983 report provided a cross-reference from the then-existing TSUS to the proposed tariff schedule. The table on page 603 of Annex II converted Item 411.76, TSUS, into five provisions in the new tariff schedule; proposed subheading 2941.90.50 is clearly included among these five provisions. Annex III to the ITC's report provided a cross-reference from the proposed tariff schedule to the then-existing TSUS. The table on page 218 of Annex III converted proposed subheading 2941.90.50 into two TSUS provisions, one of which is Item 411.76. The original draft thus evinces an intent that subheading 2941.90.50 continue to embrace "Drugs: Antibiotics: Other."

[9] *Conversion of the Tariff Schedules of the United States Into the Nomenclature Structure of the Harmonized System, Revised, Showing Administrative Changes Approved by the Trade Policy Staff Committee, Trade Policy Staff Committee,* Office of the U.S. Trade Representative (September 1984).

[10] On October 5, 1987 the ITC instituted investigation No. 332–250; one of the purposes of this study was to prepare a cross-reference between the 1987 TSUS and the final proposed HTS. The ITC's report was published in January 1988. *Continuity of Import and Export Trade Statistics After Implementation of the Harmonized Commodity Description and Coding System: Report to the President on Investigation No. 332–250 Under Section 332 of the Tariff Act of 1930,* USITC Publication No. 2051 (January 1988) *("1988 Cross-Reference Report").* The table on page 158 of the report indicates that Item 411.76, TSUS, is converted into subheadings 2941.40.00; 2941.90.10; 2941.90.30; 3003.20.00; 3004.10.50; and 3004.20.00 of the proposed HTS. Subheading 2941.90.50 is clearly absent from this group. It thus appears that the previously evinced intent to retain other antibiotic drugs within the scope of subheading 2941.90.50, HTS, had been abandoned by the time the new tariff schedule was finally enacted. *See supra* note 8.

[11] Pub. L. No. 100–418, § 1204, 102 Stat. 1107, 1148 (1988); *see* 19 U.S.C. § 3004 (1988).

[12] Pub. L. No. 100–418, § 1217, 102 Stat. 1107, 1163 (1988); *see* 19 U.S.C. § 3001 (1988).

pendent heading, i.e. Heading 2941.[13] Significantly, none of the forty-two Headings in Chapter 29 of the first edition of the HTS incorporated the term "drugs;" nor have these Headings since been amended to include the term in subsequent editions of the tariff schedule. Although the term "drugs" was retained, its position had been relegated to isolated subheadings, none of which were included under Heading 2941; in fact, the term "drugs" was incorporated into only sixty-three of the approximately 875 subheadings within the original Chapter 29. And, despite retaining the term, the HTS failed to expressly define "drugs" as it was used in the new tariff schedule.

B. *The Austin Decision:*

The seminal case construing the term "drugs" under the TSUS is *Austin Chemical Co. v. United States,* 11 CIT 130, 659 F. Supp. 229, *aff'd,* 6 Fed. Cir. (T) 42, 835 F.2d 1423 (1987). The imported merchandise in *Austin,* consisting of D(–) mandelic acid, was classified by Customs under Item 404.46, TSUS.[14] Plaintiff contended that the merchandise was properly classifiable as a drug under Item 411.91, TSUS.[15] After importation the D(–) mandelic acid was sold to Eli Lilly and Company for use in the synthesis of Cefamandole Nafate, a cephalosporin antibiotic which also contains the four-membered beta-lactam ring. D(–) mandelic acid is a chemical intermediate which, after synthesis, imparts the mandelic acid moiety to Cefamandole Nafate. Unlike the ADC-6 moiety present in Imipenem, the mandelic acid moiety does not form the beta-lactam ring present in Cefamandole Nafate; rather, the mandelic acid moiety appears as a functional side-chain on the four-membered beta-lactam ring. The mandelic acid moiety protects the beta-lactam ring from hydrolysis of the amide bond by beta-lactameses produced by the target bacteria. Absent the mandelic acid moiety, Cefamandole Nafate would be susceptible to cleavage by beta-lactameses, resulting in the effective loss of its antibacterial properties.

Concededly, the mandelic acid could not be used alone as a curative. The trial court distinguished, however, between substances that are therapeutic and those that possess therapeutic *properties*. Because the imported D(–) mandelic acid imparted desirable properties to Cefamandole Nafate which enhanced the effectiveness of the antibiotic, the subject merchandise was found to possess therapeutic properties.[16] The

---

[13] Heading 2941, located in subchapter 13, is entitled "Antibiotics." The term "drugs" is noticeably absent as a descriptor of antibiotics, even among the designated subheadings of Heading 2941.

[14] Item 404.46, TSUS, describes "Cyclic organic chemical products * * *: Other: Carboxylic acids * * *: Other."

[15] Item 411.91, TSUS, describes "Products suitable for medicinal use, and drugs: * * * Drugs: Other: Anti-infective agents: Mandelic Acid."

[16] The trial court stated that:

> The criterion for a drug is not that it be therapeutic but that it possess therapeutic properties. The ability of the mandelic acid to prevent the breakdown of the beta-lactams cannot be denied. When a substance which possesses such desirable properties, although incapable of use alone, is combined with other substances to produce the physiological action to correct the deficient condition, it may properly be classified as a drug * * *. Therefore, it appears that this characteristic which relates to the treatment of disease by a remedial agent or method is thus, a "therapeutic property".
>
> In comparison, * * * for purposes of the term "medicinal preparation", the substance itself must possess the therapeutic or curative property.

Continued

trial court further relied upon dictionary definitions of the terms "ingredient" and "constituent" to conclude that Congress intended to recognize "that before the chemical reaction[producing Cefamandole Nafate] occurs, the component substances of the compound are properly deemed ingredients." *Austin*, 11 CIT at 135, 659 F. Supp. at 233. Consequently, the court deemed D(–) mandelic acid to be an ingredient possessing therapeutic properties which was properly classifiable as a drug under the TSUS.[17] On appeal, the Court of Appeals for the Federal Circuit affirmed the trial court's decision. In doing so, the court held that the trial court did not err when it determined that "'therapeutic' properties include the imparting of 'properties to the other substances which are necessary to produce an effective antibiotic.'" *Austin*, 6 Fed. Cir. (T) at 45, 835 F.2d at 1426.

C. *TSUS Classification of ADC-6:*

ADC-6 was the subject of protest no. 1001–8–007318, filed on behalf of Merck as protesting party. Customs had classified imported ADC-6 under Item 425.52, TSUS, as Nitrogenous compounds: Other: Other. Upon denial of its protest, Merck commenced an action before this court. Apparently in light of the holding in *Austin*, the parties entered into a Stipulated Judgment on Agreed Statement of Facts. *Merck & Co. v. United States*, Court No. 89–06–00329 (Jan. 8, 1991). In that Stipulated Judgment, the government agreed that ADC-6 was properly dutiable as "other antibiotics obtained, derived, or manufactured in whole or in part from modified benzenoids under Item 411.76, TSUS, at the rate of 6.6% *ad valorem*." *Id.* In the TSUS, antibiotics are located under the broader descriptor "drugs." The government thus conceded that, under the TSUS, ADC-6 was properly classifiable as a drug, and, more specifically, an antibiotic.

D. *Analysis:*

Lonza argues that because there has been no material change in the language of the HTS provision for antibiotics from that found in the TSUS, and because the structure of the HTS allegedly retains a distinction between "drugs" and "medicaments" for tariff purposes, the *Austin* rationale and the *Merck* Stipulated Judgment compel a finding that ADC-6 is classifiable as an antibiotic under Chapter 29 of the HTS. Lonza asserts that, despite its removal from the controlling tariff schedule, the TSUS definition of "drugs" constitutes the common and

---

* * * * * * *

Thus, even though according to [defendant's expert] the D(–) mandelic acid in and of itself may not be therapeutic, it is sufficient that it is crucial to the ultimate formation of the antibiotic so that it may be deemed to possess therapeutic properties.

Austin, 11 CIT at 133–34, 659 F. Supp. at 231–32 (footnote omitted) (citations omitted).

[17] The government also argued that the D(–) isomer of mandelic acid was not *eo nomine* "mandelic acid" under Item 411.91, TSUS. Because the subject merchandise satisfied the superior heading of "drugs" in that it possessed therapeutic properties and was used as an ingredient in medicine (the only qualifiers to the *eo nomine* provision "mandelic acid"), and because the TSUS did not contain separate provisions for the various isomers of mandelic acid, the court held the D(–) isomer properly classifiable under Item 411.91. *Austin*, 11 CIT at 136.

commercial meaning of the term, and thus governs classification of antibiotic "drugs" under the HTS. The government argues that "[n]owhere in the applicable HTS section notes, the chapter notes, or in the Explanatory Notes[18] is there any indication, at all, that chemical intermediates used in the manufacture of a finished organic chemical product are classifiable under the heading for that finished product absent independent satisfaction of the relevant criteria for such classification." *Defendant's Pretrial Memorandum* at 10. Because ADC-6 does not satisfy the criteria for classification as an antibiotic under the HTS, the government urges the court to affirm Customs' classification decision. The court will first examine whether ADC-6 meets the TSUS definition of "drugs."

1. *ADC-6 satisfies the definition of "drugs" found in the TSUS:*

Based upon the evidence presented at trial, and prior caselaw, the court agrees with Lonza that ADC-6 is a substance that possesses therapeutic properties and is chiefly used as an ingredient in medicine. First, with respect to whether ADC-6 possesses therapeutic properties, it is undisputed that ADC-6 contributes all of the atoms in Imipenem's beta-lactam ring; as Lonza's expert witness, Dr. Thomas N. Salzmann, testified, the beta-lactam ring is the antibiotic's killing site, without which the substance is useless as an antibacterial agent. In addition, ADC-6 contributes the entire hydroxyethyl side-chain, without which Imipenem is both defenseless and unable to identify target bacteria. Clearly, absent the ADC-6 moiety, Imipenem is bereft of therapeutic (i.e. antibacterial) value. Just as D(–) mandelic acid was held to possess therapeutic properties because it "impart[s] properties to * * * other substances which are necessary to produce an effective antibiotic," ADC-6 merits a similar evaluation. Indeed, whereas D(–) mandelic acid contributes only a defense element, ADC-6 imparts a killing element, a recognition element, and a defense element to the final antibiotic product. The significance of these contributions can hardly be ignored.

The government urges, however, that in order to be considered therapeutic, a substance must itself be curative. It is conceded that ADC-6 neither kills nor inhibits the growth of microorganisms. Nonetheless, ADC-6 is properly characterized as having therapeutic properties because the elements it imparts are crucial to the ultimate formation of an effective antibiotic. This is the standard sanctioned by our appellate court,[19] and this standard is met in the present case. The government simply fails to recognize *Austin's* distinction between therapeutic uses

---

[18] Customs Co-Operation Council, *Harmonized Commodity Description and Coding System: Explanatory Notes* (1986) *("Explanatory Notes")*. The Customs Co-Operation Council was established by a Convention signed in Brussels on December 15, 1950. The *Explanatory Notes* constitute the Council's official interpretation of the Harmonized Tariff System.

[19] *Austin*, 6 Fed. Cir. (T) at 45–46, 835 F.2d at 1426, *aff'g Austin Chemical Co. v. United States*, 11 CIT 130, 659 F. Supp. 229 (1987).

and therapeutic *properties*.[20] The court concludes that although ADC-6 itself may not be used as an antibacterial agent, the curative qualities it imparts to Imipenem are of such import that ADC-6 is properly regarded as exhibiting therapeutic properties.

Secondly, the court concludes that ADC-6 is properly considered an ingredient used in the production of Imipenem. At trial, the government's expert witness, Ms. Patricia Gafney, characterized ADC-6 as a mere "stepping stone" between the parent substance and the final product, i.e. a chemical intermediate whose identity is lost during the process of synthesizing Imipenem. Ms. Gafney also testified that the term "ingredient" is not synonymous with the term "chemical intermediate" in the field of chemistry. And finally, the government referred the court to the *Physician's Desk Reference* (46th ed. 1992), which lists the ingredients in PRIMAXIN® as: (1) a sterile formulation of Imipenem; (2) sodium cilastatin; and (3) sodium bicarbonate. ADC-6 is noticeably absent from this list.

Dr. Salzmann testified, however, that characterizing a substance as an ingredient is a functional judgment that is facilitated by identifying the atoms contributed by a substance to the final compound. In addition to this functional analysis, it has long been recognized that when ascertaining the meaning of a tariff term, the court may consult extrinsic sources.[21] *See, e.g., Productol Chemical Co. v. United States*, 74 Cust. Ct. 138, 142, C.D. 4598 (1975). The court notes that *The Oxford English Dictionary* (2d ed. 1989) defines "ingredient" as:

> **3.a.** Something that enters into the formation of a compound or mixture; a component part, constituent, element. Primarily used of medical compositions and other artificial material mixtures, but also of natural compounds and of things immaterial, actions, conditions, etc.

The court is persuaded that the government adopts too narrow a view. As a substance that enters into the formation of a medical compound, ADC-6 satisfies this dictionary definition. Furthermore, under Dr. Salzmann's functional analysis, the court notes that the *sole* purpose of ADC-6 is to contribute to the formation of Imipenem. And finally, the

---

[20] *Austin*, 11 CIT 132–33, 659 F. Supp. at 231–32. The *Austin* court first noted that "therapeutic" is defined to mean "of or relating to the treatment of disease or disorders by remedial agents or methods; CURATIVE, MEDICINAL." *Id.* at 133, 659 F. Supp. at 231 (citing *Webster's Third New International Dictionary* (1966)). The court also noted that "[p]roperties are the characteristics of a substance and chemical properties are the chemical reactions of a substance." *Id.* at 133 n.1, 659 F. Supp. at–232 n.1 (citing *Hackh's Chemical Dictionary* (4th ed. 1969)). Thus, the curative characteristics contributed by a substance via chemical reaction may be deemed "therapeutic properties." In contrast, the term "therapeutic use" indicates that a substance, by itself, is in a condition ready for use as a curative. *See Austin*, 11 CIT at 133, 659 F. Supp. at 231–32.

[21] For example, to support its conclusion that D(–) mandelic acid is an ingredient in Cefamandole Nafate, the *Austin* court cited the following definitions of the term "ingredient":

> *Webster's Third New International Dictionary*, (1966) * * *:
>
> 2. That which enters into a compound, or is a component part of any combination or mixture: CONSTITUENT.
>
> *Hackh's Chemical Dictionary*, (4th Ed. 1969) * * *:
>
> **ingredient.** Any constituent of a mixture. Cf. constituent.
>
> **constituent.** (1) An element or part of a compound. Cf. *component* of a mixture. (2) An element or compound formed from the components, * * * of a system.

Austin, 11 CIT at 135, 659 F. Supp. at 233. ADC-6 may similarly be considered an ingredient in Imipenem, when measured against these definitions.

exhibits introduced at trial clearly indicate that the ADC-6 moiety remains cognizable as a portion of the final synthesized compound. Just as D(–) mandelic acid was determined to be an ingredient used in the production of Cefamandole Nafate, so too is ADC-6 accurately described as an ingredient used in the production of Imipenem.

2. The TSUS definition of "drugs" constitutes the common and commercial meaning of the term under the HTS:

Although the court finds that ADC-6 meets the definition of "drugs" found in the TSUS, this conclusion is not dispositive. The second issue to be addressed is whether the TSUS definition of "drugs" continues to apply under the HTS. Lonza argues that notwithstanding the fact that the HTS fails to include an express definition of the term, the TSUS definition of "drugs" continues to govern tariff classification because it reflects the common and commercial meaning of the term, and that meaning has not changed since the HTS was enacted.

Unless a contrary legislative intent is shown, tariff terms are construed in accordance with their common and commercial meanings, which are presumed to be the same. *See, e.g., Nippon Kogaku (USA), Inc. v. United States,* 69 CCPA 89, 92, 673 F.2d 380, 382 (1982); *Schott Optical Glass, Inc. v. United States,* 67 CCPA 32, 34, 612 F.2d 1283, 1285 (1979). The common meaning of a tariff term presents a question of law to be decided by the court. *American Express Co. v. United States,* 39 CCPA 8, 10, C.A.D. 456 (1951). In cases where a term is defined by statute, the court need not undertake a common-meaning inquiry, for the statutory definition is controlling. *Overton & Co. v. United States,* 85 Cust. Ct. 76, 80–81, C.D. 4875 (1980). Absent an express definition, however, the court may consult dictionaries, lexicons, scientific authorities, and other such reliable sources in its effort to determine common meaning. *C.J. Tower & Sons of Buffalo, Inc. v. United States,* 69 CCPA 128, 133–34, 673 F.2d 1268, 1271 (1982).

As noted, the TSUS definition of "drugs" was drafted "in light of prevailing customs practice as well as usage in the industry."[22] Congress' definition was thus intended to coincide with the common and commercial meaning of the term. This definition remained intact as an express provision in each of the eighteen editions of the TSUS, which spanned over twenty-five years. Although it appears that the TSUS definition of "drugs" was deliberately abandoned (in light of the fact that an earlier draft of the HTS contained an amended definition of the term), the HTS failed to provide any alternative definition despite retaining the term "drugs" in various subheadings within Chapter 29. The common meaning of a tariff term, once established, remains controlling until a subsequent change in statute compels a revised construction of the term's meaning. *United States v. Great Pacific Co.,* 23 CCPA 319, 324, T.D. 48192 (1936); *see Sears Roebuck & Co. v. United States,* 46 CCPA 79, 83, C.A.D. 701 (1959). The mere retraction of an express definition from the

[22] *Tariff Classification Study,* Schedule 4, Part 1, at 21.

controlling tariff schedule, in and of itself, does not compel a revised construction. Absent clear evidence of legislative intent to embrace an alternative statutory definition, and in light of its historical pedigree, the court cannot help but conclude that the TSUS definition of "drugs" survives as the common and commercial meaning of the term under the HTS.[23]

3. *The TSUS definition of "drugs" does not govern the classification of antibiotics under the HTS:*

Having determined that the TSUS definition of "drugs" survives as the common meaning of the term under the new tariff schedule, the court must address whether this definition impacts the classification of antibiotics under the HTS. The court concludes that it does not. There are four elements to the court's analysis.

First, as the government noted at trial, Congress effected an express change in the tariff description of antibiotics when it implemented the HTS; antibiotics are no longer classified as a subset of the broader heading "drugs," as they were under the TSUS. Instead, the term "antibiotics" has been elevated as the *sole* descriptor of Heading 2941. Subchapter 13, Chapter 29, HTS, unambiguously indicates that the only prerequisite to classification under Heading 2941 is satisfaction of the criteria embraced by the term "antibiotics."

Lonza responds to the government's observation with two points. First, Lonza offers the court a side-by-side comparison of Items 411.60 through 411.76, TSUS, and Heading 2941, HTS, in support of its argument that no material change was intended in the tariff treatment of antibiotics under the HTS. This comparison is deficient in one major respect; namely, it fails to acknowledge the deliberate omission of the term "drugs" as a general descriptor of antibiotics under the HTS. It is immaterial that specific provisions for antibiotics remained unchanged in the new tariff schedule. What is significant is that under the HTS, antibiotics constitute an independent Heading within Chapter 29; this is a marked departure from the TSUS framework, which placed antibiotics within the broader descriptor "drugs." Secondly, Lonza notes that in converting the TSUS into the Harmonized System, the ITC was directed to avoid changes in rates of duty wherever possible;[24] and, if the TSUS definition of "drugs" does not apply to Heading 2941, the duty assessed upon imports of ADC-6 will be increased. This drafting guideline, however, simply cannot overcome the actual framework adopted, and the specific language chosen, by Congress when it enacted the

---

[23] The court's conclusion is further supported by reference to *The Oxford English Dictionary* (2d ed. 1989), which defines the term "drug" as:

> **1.a.** An original, simple, medicinal substance, organic or inorganic, whether used by itself in its natural condition or prepared by art, or as an ingredient in a medicine or medicament. Formerly used more widely to include all ingredients used in chemistry, pharmacy, dyeing, and the arts generally * * *.

This definition accords with that found in the TSUS; thus, it is evident that the TSUS definition continues to reflect the common meaning of the term.

[24] *1983 ITC Conversion Report,* at 30.

HTS.[25] The term "drugs" is expressly limited to sixty-three subheadings in Chapter 29, in utter contrast to its scope under the TSUS. Furthermore, the term is employed nowhere among the eleven subheadings within Heading 2941.[26] The implication is clear. The classification of imports as antibiotics is confined solely to those substances that independently satisfy the criteria for an antibiotic; the term "drugs" is no longer relevant to this classification decision under the HTS.

Second, the court rejects Lonza's assertion that antibiotics should be treated as drugs simply by virtue of their location in Chapter 29. Lonza argues that the HTS incorporates a distinction between drugs and medicaments by classifying the former solely within Chapter 29, while the latter are classified solely within Chapter 30. Lonza bases its position on the fact that "[t]he term 'drugs' appears throughout Chapter 29," while "[t]he term 'medicaments' as well as specific types of medicaments are employed throughout Chapter 30." *Pretrial Memorandum of Plaintiff* at 16 n.4, 18. As the court noted, however, Congress made limited use of the term "drugs" in Chapter 29; had Congress intended that all organic chemicals provided for in Chapter 29 of the HTS be treated as drugs, it would have utilized the term more broadly, just as it did in the TSUS. Furthermore, Lonza's argument is undermined by reference to subheadings 2918.21.10 and 2918.23.10, HTS. Subheading 2918.21.10 describes "Salicylic acid and its salts: Suitable for medicinal use." Subheading 2918.23.10 describes "Salol (Phenyl salicylate) suitable for medicinal use." If the distinction between drugs and medicaments under the HTS were as absolute as Lonza asserts, these substances should have been provided for under Chapter 30. Instead, they are included in Chapter 29. The historical distinction between drugs and medicaments thus appears irrelevant to the classification of organic chemicals under the HTS.

Third, Lonza asserts that antibiotics are commonly understood to be drugs, and that therefore Heading 2941, HTS, incorporates the TSUS definition of "drugs." The court first notes that *The Oxford English Dictionary* (2d ed. 1989) defines the term "antibiotic" as:

> **2.** Injurious to or destructive of living matter, esp. micro-organisms.
>
> **3.** [A]n antibiotic substance: one of a class of substances produced by living organisms and capable of destroying or inhibiting the growth of micro-organisms; spec. any of these substances used for therapeutic purposes. Also used of synthetic organic compounds having similar properties.

---

[25] This case does not present the first instance in which a classification concept under the TSUS has been altered. *See, e.g.,* Ruth F. Sturm, *Customs Law & Administration* § 50.4 at 21 (1993) (comparing use of the term "of" under the TSUS and "wholly of" under the HTS).

[26] Heading 2941 may be contrasted with Heading 2933, HTS, in this regard. Subheading 2933.59 embraces an additional eight subheadings that are introduced by the broader descriptor "drugs." Similarly, subheading 2933.90 embraces eleven additional subheadings that are introduced by the term "drugs."

In addition, *Van Nostrand's Scientific Encyclopedia* (7th ed. 1989) defines the term "antibiotic" as:

> A biochemical drug, derived from one or more kinds of microorganisms, which has the ability to (1) inhibit the growth *(bacteriostatic agent)*, or (2) to kill *(bactericidal agent)* a number of other microorganisms and thus of immense value in treating a number of diseases that result from microbial infection.

The court also notes that each party's expert witness testified that the commonly accepted meaning of the term "antibiotic" includes the ability of a substance to kill or inhibit the growth of bacteria. Indeed, Lonza's expert witness, Dr. Salzmann, testified that ADC-6 would not commonly be considered an antibiotic precisely because it lacks the ability to kill bacteria or to inhibit bacterial growth. Nevertheless, Dr. Salzmann also testified that he believed ADC-6 was properly classified as an "antibiotic," as that term is used in the tariff schedules. Dr. Salzmann thus seems to envision a distinction between the meaning of "antibiotic" as it is used in the HTS, and the commonly accepted meaning of the term. This position is unfounded.

The testimony of both expert witnesses indicates a common understanding of the term "antibiotic" that is consistent with dictionary definitions previously cited. The court recognizes that *Van Nostrand's* refers to an antibiotic as a biochemical drug. Still, the defining characteristic of antibiotic substances common to all definitions is the ability to kill or inhibit the growth of microorganisms. The term "drug" adds nothing to an understanding of what is meant by "antibiotic." Segregation of these terms is further supported by the expert testimony of Ms. Gafney, who proffered thienamycin as an example of a substance that is not considered a drug, and yet is still classifiable under Heading 2941 as an antibiotic. Although thienamycin, by itself, exhibits antibacterial properties, it is not considered a drug because it is not used as a medicine or as an ingredient in a medicine.

Consequently, upon consideration of all of the evidence presented, the court finds that antibiotics are commonly understood to mean substances, produced either naturally or synthetically, that exhibit an ability to kill or inhibit the growth of microorganisms. And, as noted, tariff terms are generally construed in accordance with their common meaning. In this case there is no evidence that Congress intended to apply any meaning other than the common meaning of "antibiotics," nor does there appear to be a conflicting commercial designation of the term. As a result, the court finds that the common meaning of the term "drugs" is not incorporated into the common meaning of the term "antibiotics." Chemical intermediates devoid of the ability to kill or inhibit the growth of bacteria simply do not merit classification as an antibiotic under Heading 2941, HTS.[27]

---

[27]Dr. Salzmann also testified that in the eyes of the scientific community, the term "chemical intermediate" is not synonymous with the term "antibiotic." It is undisputed that ADC-6 is an intermediate used in the synthesis of Imipenem.

Fourth, the HTS *Explanatory Notes* support the court's conclusion in this case. While the *Explanatory Notes* do not constitute controlling legislative history, they do offer guidance in interpreting HTS subheadings.[28] *Pfaff American Sales Corp. v. United States,* 17 CIT ____, Slip Op. 93–101 (CIT June 9, 1993). *Explanatory Note* 29.41 offers a narrow definition of the term "antibiotics." The government relies upon this definition and others like it to argue that classification under Heading 2941 is restricted to antibiotics that are produced naturally. The government fails to acknowledge, however, that by including "certain synthetic products closely related to natural antibiotics and used as such," *Note* 29.41 includes substances of purely synthetic origin. While a determination of what is meant by "closely related" is beyond the scope of this opinion, when viewed in its entirety *Explanatory Note* 29.41 does not appear to conflict with the court's determination of what constitutes the common meaning of the term "antibiotics."[29]

Explanatory Note 29.41 includes examples of substances that merit classification as an antibiotic, as well as substances that are not covered by Heading 2941. Because *Explanatory Note* 29.41(b) provides that chemical intermediates used in the manufacture of antibiotics and possessing a very low antibiotic activity are precluded from classification under Heading 2941, the government argues that ADC-6, a chemical intermediate devoid of the ability to kill or inhibit the growth of bacteria, is similarly precluded from such classification. Lonza responds by urging that while "the term 'antibiotic activity' [generally] refers to a substance's ability to kill or inhibit the growth of microorganisms, * * * this construction[,] in the context of *[Explanatory Note* 29.41,] would render the referenced *Explanatory Note* meaningless." *Pretrial Memorandum of Plaintiff* at 32. Specifically, Lonza argues that this reading of

---

[28] The *Explanatory Notes* to Chapter 29, subchapter XIII, Heading 2941, HTS, state in pertinent part:

> Antibiotics are substances secreted by living microorganisms which have the effect of killing other microorganisms or inhibiting their growth * * *.
>
> * * * * * * * * *
>
> Antibiotics may consist of a single substance or a group of related substances, their chemical structure may or may not be known or chemically defined. They are chemically diverse and include the following:
>
> (1) **Heterocyclic,** e.g., novobiocin, cephalosporins, streptothricin. The most important of this class are the **penicillins** which are secreted by several species of the fungus *Penicillium.* This class also includes procaine penicillin.
>
> * * * * * * * * *
>
> (7) **Other antibiotics,** e.g., sarkomycin, vancomycin.
>
> This heading also includes chemically modified antibiotics used as such. These may be prepared by isolating ingredients produced by natural growth of the micro-organism and then modifying the structure by chemical reaction or by adding sidechain precursors to the growth-medium so that desired groups are incorporated into the molecule by the cell-processes (semi-synthetic penicillins); or by bio-synthesis (e.g., penicillins from selected amino-acids).
>
> Natural antibiotics reproduced by synthesis (e.g., chloramphenicol) are classified in this heading, as are certain synthetic products closely related to natural antibiotics and used as such (e.g., thiamphenicol).
>
> This heading **does not cover:**
>
> * * * * * * * * *
>
> (b) Chemically defined organic compounds with a very low antibiotic activity, used as intermediates in the manufacture of antibiotics **(earlier headings of this Chapter according to structure).**

1 *Explanatory Notes* at 423.

[29] To the extent the definition of "antibiotics" found in the *Explanatory Notes* conflicts with the court's determination, that definition is rejected. The expert testimony presented at trial indicates that synthetic and synthetically-modified antibiotics are of recent discovery. Thus, it is not unlikely that dated sources define antibiotics only as naturally-produced substances. As Dr. Salzmann testified, however, the origin of an antibiotic substance has no bearing on its antibiotic activity.

Explanatory Note 29.41 cannot be sustained because "there exist *no* specifically defined chemical compounds currently used as intermediates in the manufacture of antibiotics which have the ability to kill or inhibit the growth of bacteria." *Id.* at 32–33. Instead, Lonza asserts that "the phrase 'antibiotic activity' must refer to the antibiotic or therapeutic *properties* of compounds used as intermediates in the manufacture of antibiotics." *Id.* at 33.

The court finds Lonza's argument thoroughly unpersuasive. The fact that there are no chemical compounds currently used as intermediates in the manufacture of antibiotics, and which possess an ability to kill or inhibit bacterial growth, does not render *Explanatory Note* 29.41 meaningless; it is entirely possible that such substances exist, but merely await discovery. The authors of the *Explanatory Notes* cannot be faulted for anticipating future developments in the field of biochemistry when they drafted *Note* 29.41.

Moreover, the absence of any antibiotic activity completely satisfies the criterion of "very low antibiotic activity." In the context of the present case, this plain reading of the criteria discussed in *Note* 29.41 affords the *Note's* proscription immediate effect. *Explanatory Note* 29.41 provides that substances exhibiting "very low antibiotic activity" are properly classified within earlier Headings of Chapter 29, according to structure. The court finds that ADC-6 does not exhibit any "antibiotic activity" because it lacks the ability to kill or inhibit the growth of bacteria. This accords with the court's determination of the common meaning of the term "antibiotic." Because the court finds that "very low antibiotic activity" embraces "no antibiotic activity," the *Explanatory Notes* indicate that ADC-6 is properly classified earlier within Chapter 29, according to its chemical structure. This is precisely what Customs did when it classified ADC-6 under Heading 2922 as other oxygen-function amino-compounds. Based upon the foregoing analysis, the court finds that Customs' classification of the subject merchandise was correct.

Conclusion

Although the TSUS definition of "drugs" continues to represent the common and commercial meaning of the term under the HTS, where that term is employed, the relevant statutory framework has changed such that chemical intermediates used in the production of an antibiotic are not classifiable as an antibiotic, absent independent satisfaction of the criteria for such classification. The term "antibiotic" is commonly understood to mean the ability to kill or inhibit the growth of microorganisms. Because ADC-6 lacks the ability to kill bacteria or to inhibit bacterial growth, it is ineligible for classification as an antibiotic under the HTS. Customs' classification is affirmed; judgment will be entered accordingly.

ABSTRACTED CLASSIFICATION DECISIONS

DECISION NO. DATE JUDGE	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
C94/20 3/21/94 Restani, J.	Kleinewefers Paper Converting Machine Company	90–07–00360, 92–02–00086	8420.10.90.80, 8420.91.90 and 8420.99.90 3.7%	8420.10.20 Free of duty 8420.91.20 Free of duty 8420.99.20 Free of duty	Agreed statement of facts	Boston, Mass., Balitimore, Md. Calendering or other rolling machines
C94/21 3/24/94 Carman, J.	Heraeus Amersil, Inc.	82–10–01359	548.05 12.5%, 11.8% or 11% 540.67 25%, 23.1% or 21.3%	547.53 10%, 9.5% or 9%, etc. Various rates	Agreed statement of facts	New York (Newark) Rotosil etc. or any other merchandise classified as optical glass under item 540.67
C94/22 3/24/94 Carman, J.	Heraeus Amersil, Inc.	82–10–01350	548.05 12.5%, 11% 540.67 25%, 23.1% or 21.3%	547.53 10%, 9%, etc. Various rates	Agreed statement of facts	New York (Newark) Rotosil etc. or any other merchandise classified as optical glass under item 540.67 TSUS
C94/23 3/24/94 Carman, J.	Heraeus Amersil, Inc.	82–10–01436, etc.	548.05 12.5% 540.67 25% or 23.1%	547.53 10% etc. Various rates	Agreed statement of facts	New York (Newark) Rotosil etc. or any other merchandise classified as optical glass under item 540.67 TSUS

ABSTRACTED VALUATION DECISIONS

DECISION NO. DATE JUDGE	PLAINTIFF	COURT NO.	VALUATION	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
V94/8 3/21/94 Carman, J.	Porterhouse, Ltd.	92–10–00704	Transaction value	$18,140.80	Agreed statement of facts	New York Ladies' knit wearing apparel
V94/9 3/23/94 Musgrave, J.	A.N. Deringer	86–05–00571	Transaction value	Deductive value $13,848.46, $17,219.23, $4,765.78 etc.	Orbisphere Corp. *v.* United States Slip Op. 89–149 (October 24, 1989), Court No. 87–02–00404	Boston Oxygen analyzing apparatus

Index

Customs Bulletin and Decisions
Vol. 28, No. 15, April 13, 1994

U.S. Customs Service

Treasury Decisions

	T.D. No.	Page
Commercial gauger/laboratory, Customs approval:		
Accutest Services, Inc.	94–30	6
Chem Coast, Inc.	94–28	2
SGS Control Services, Inc.	94–27	1
E.W. Saybolt & Co., Inc.	94–31	7
Frozen produce; country of origin marking requirements; suspension of compliance date; part 175, CR amended (errata)	94–5	15
North America Free Trade Agreement (NAFTA); interim regulations; solicitation of comments; part 181, CR amended; corrections to original document	94–1	10
Textiles and textile products; penalty guidelines; interim rule; solicitation of comments; part 171, CR amended	94–29	3
Tuna fish tariff-rate quota for calendar year 1994	94–33	9
User fee, ad valorem; conforming amendment; final rule; part 24, CR amended	94–32	8

General Notices

	Page
Customs "Mod Act", public meetings to be held in San Francisco, April 26; New Orleans, May 6; New York, May 24; and Newark, May 25	19
Frozen produce; country of origin marking requirements; solicitation of comments; parts 134 and 175, CR amended	17
Tariff classification, ruling letters:	
Modification:	
Medical products assembled abroad and sterilized	46
Proposed modification; solicitation of comments:	
Agglomerated stone articles	50
Proposed revocation; solicitation of comments:	
Cigar scrap tobacco for duty-free treatment under CBERA	21
Glasses	59
Revocation:	
Fishing net, string-drawn, hand-cast	39
Flux	43
Ribbon, warp-knit, with inserted metalized strips	35
Women's garments:	
"One size fits all"	31
Vests, long knit	29

Proposed Rulemakings

	Page
Textiles and textile products:	
Conditional release period, establishment of; solicitation of comments; part 141, CR amended	79
Country of origin, importer certification; solicitation of comments; part 12, CR amended	75

U.S. Court of International Trade

Slip Opinions

	Slip Op. No.	Page
Lonza, Inc. *v.* United States	94–50	85

Abstracted Decisions

	Decision No.	Page
Classification	C94/20–C94/23	100
Valuation	V94/8–V94/9	101

U.S. G.P.O. 1994–301–610–60092